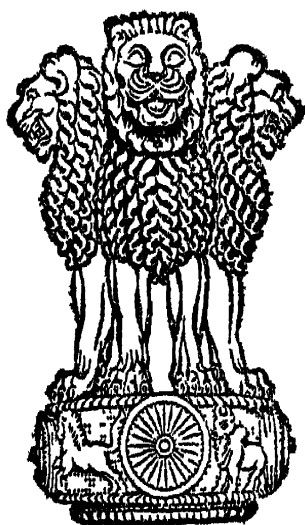

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**THE
CONSTITUTIONAL LAW
OF THE
UNITED STATES**

SECOND EDITION

BY

WESTEL WOODBURY WILLOUGHBY

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UNITED STATES CONSTITUTIONAL LAW

VOLUME II

CHAPTER XXXIX

ELECTION OF MEMBERS OF CONGRESS¹

§ 347. Their Apportionment among the States.

The Constitution provides that the House of Representatives shall be composed of members chosen every second year by the people of the several States, and that they shall be apportioned among the States according to their several populations, the whole number of persons in each State, excluding Indians not taxed, being counted.² The Fourteenth Amendment further provides that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive or judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This amendment thus leaves it within the constitutional power of the States to place such restrictions as they may choose upon the exercise of the suffrage within their limits, but subject to a reduction in the number of representatives to which they are entitled in Congress to the extent to

¹ The Senate and House of Representatives are spoken of as two "Houses" of Congress, the Senate being often termed the Upper House, and the House of Representatives, the Lower House, or, simply the "House."

² The original provision of the Constitution (Art. 8, Sec. 88, Cl. 3) was as follows: "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

By Section 2 of the Fourteenth Amendment, it is provided that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

which the right to vote is denied to adult male inhabitants, citizens of the United States.

The Fifteenth Amendment, adopted two years later, places the absolute prohibition upon the States that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color or previous condition of servitude." And the Nineteenth Amendment, adopted in 1920, declares that "the right to vote shall not be denied or abridged by the United States or by any State on account of sex."

By some it has been argued that the Fifteenth Amendment is to be construed as repealing the clause of the Fourteenth Amendment relating to the reduction of the representation of the States, in that it renders constitutionally impossible the action which it was the object of that clause to deter the States from taking. This argument, though it has had the support of eminent authority,³ cannot be considered a sound one, for the clause of the Fourteenth Amendment provides for a reduction not simply in cases where adult male inhabitants, citizens of the United States, are denied the right to vote because of race, color or previous condition of servitude, but for any cause whatever, saving for participation in rebellion or other crime.

As is well known, most of the Southern States have, by various provisions inserted in their several constitutions, in large measure eliminated the negro vote. This has led to a certain amount of agitation both in the public press and in Congress for the enforcement of the reduction of representation clause of the Fourteenth Amendment, but as yet no decisive steps have been taken.⁴

In various States of the Union property, educational, and other qualifications upon the right to vote have been established. These limitations upon adult male suffrage have not, however, led to any attempt by Congress to apply the reduction of representation clause of the Fourteenth Amendment.⁵

§ 348. The Mode of Apportionment.

In the first Congress representatives were apportioned among the States according to a rough estimate as to their respective populations. Since

³ E. g., Senator John Sherman, *Recollections*, I, 450. See also article by Mr. Emmet O'Neal in *North American Review*, Vol. 181, p. 530.

⁴ In the platform of the Republican party adopted by the National Convention in 1904 it was declared: "We favor such congressional action as shall determine whether, by special discriminations, the elective franchise in any State has been unconstitutionally limited, and, if such be the case, we demand that representation in Congress and in the Electoral College shall be proportionally reduced, as directed by the Constitution of the United States."

⁵ The State courts have very generally held that reasonable registration and other laws for the protection of the voter against fraud, intimidation, ignorance, etc., are not unconstitutional under the State Constitution as adding to the qualifications laid down. Cf. Cooley, *Const. Lim.*, 7th ed., Ch. XVIII.

that time new apportionments have been based upon the figures of the decennial censuses.

There are no instances in which the courts have attempted to revise the apportionment of representatives by Congress. As regards, however, the determination by the States of districts for the election of the members of their respective State legislatures, the State courts have frequently interfered upon the ground that the districting has been in violation of State constitutional provisions regarding equality of representation.⁶

The last reapportionment of Representatives is that of 1911 which fixed the number of Representatives at 433. This number has since been increased by two by the admission to the Union as States of Arizona and New Mexico with one Representative each. The act of 1911 changed somewhat the method of apportionment which had previously been applied.⁷

⁶ Cf. Foster *On the Constitution*, 399 *et seq.*

⁷ This new system, in its relation to prior systems, is described as follows in the *American Year Book*, for 1911, p. 191: "During the early history of the country the number used as a divisor into the population of each State was assumed arbitrarily as a round number and one Representative assigned to a State for each whole number in the quotient. . . . In 1840 the plan of fixing the divisor arbitrarily was abandoned for the plan of reaching it by dividing the population of all the States by the assumed number of representatives. Representatives were assigned for each unit in the series of quotients found by dividing the population of each State by the quotient; and then one for each fraction in order of size until the requisite number of Representatives was apportioned. By this method Representatives were sometimes given for remainders of less than one half and at other times not given for remainders of more than one half. Occasionally it happened that an increase in the size of the House would decrease the Representatives apportioned to some one State (the 'Alabama Paradox'). The method introduced in 1910 assumed that the divisor was a continuous quantity between certain limits, changing, that is, by indefinitely small increments. The critical points at which the decimal part of the quotient for each State passes one half can be easily determined and divisors were selected midway between each two critical points. A series of tables was thus obtained each apportioning one more Representative than its predecessor and each apportioning one Representative for every major fraction and none for any minor fraction."

It may be said that this method of apportionment was devised by Professor W. F. Wilcox and is commonly referred to as the "method of major fractions." It has been criticized by mathematicians on the ground that the "major fractions" are not of the true quota but of an artificial quota scaled up from the true quota by means of a sliding rate or divisor, with the result, it is claimed by such critics, that it does not, as accurately as is possible, apportion members among the States in proportion to their respective populations, as required by the Constitution.

For a report of an Advisory Committee to the Director of the Census submitted to the Chairman of the Senate Committee of the Census, dealing with various possible modes of apportionment, see *Congressional Record*, April 7, 1926, p. 6840. The Committee recommended as preferable to the method of "major fractions," one devised by Professor E. V. Huntington and known as the method of "equal proportions." Regarding the method of "major fractions," the Committee said: "The method of 'major

The first apportionment bill passed by Congress was vetoed by President Washington as unconstitutional in that it provided for a representative for each thirty thousand of population, the minimum fixed by the Constitution, and also an additional number to the States having the largest fractions left over after the division was made.

§ 349. Congressional Districts.

The dividing of the States into congressional districts for the purpose of selecting representatives is left to the State legislatures. Congress has, however, provided that these districts shall be composed of contiguous territory. It has become an established rule of political practice, though not one of constitutional obligation, that a representative shall be a resident of the district in which he is elected. Representatives are, however, occasionally elected by districts in which they do not reside, and in such cases there has been no question as to their right to sit. In certain cases, congressmen at large, that is, from the whole State, are elected. This happens when a State has not been divided into districts, or where, after a reapportionment, an additional representative or representatives have been allotted a State and that State has not redistricted itself so as to provide the necessary additional districts. In such cases, of course, only the additional Representatives are elected at large.

In Ohio *ex rel. Davis v. Hildebrant*,⁸ the court held that Congress, by providing by the Reapportionment Act of 1911 that the redistricting of congressional districts should be made by each State "in the manner provided by the laws thereof," intended that where the referendum was treated as a part of the legislative power, statutes owing their existence to referendum approval were valid and applicable for the creating of such congressional districts. To the contention that the act of 1911 was unconstitutional as thus interpreted, that is, as thus impliedly recognizing the constitutionality of the employment of the referendum for legislative purposes, the court said that, as held in *Pacific States Telegraph and Telephone Co. v. Oregon*,⁹ the question was a political and therefore non-justiciable one.

§ 350. Members of the House of Representatives: by Whom Elected.

The Constitution provides that for the election of Representatives to Congress, "the electors in each State shall have the qualifications requisite

fractions' has back of it the weight of precedent. Logically, however, it can be supported only by holding that the Constitution requires, not that the ratios between the representation and the population of the several States shall be equal, as nearly as is possible, but that the representation accorded to individuals or to equal groups of individuals in the population (that is, their 'shares' in their respective Representatives) shall be as nearly uniform as is possible, irrespective of their places of residence."

⁸ 241 U. S. 565.

⁹ 223 U. S. 118.

for electors of the most numerous branch of the state legislature." This places the regulation of the suffrage wholly within the control of the several States, except for the restriction placed upon them by the Fifteenth and Nineteenth Amendments. There thus exists the fact that the National Government though able to control its citizenship by naturalization is not able to confer the suffrage for the election even of its own officials; whereas the States may confer, and, indeed, in a number of instances have conferred, this suffrage upon persons not citizens of the United States.¹⁰

§ 351. The Right to Vote for Representatives Not a Necessary Incident of National Citizenship.

That the suffrage is not a necessary incident of Federal citizenship is declared by the Supreme Court in *Minor v. Happersett*,¹¹ a case in which it was argued that a woman, a citizen of the United States, was, as such, entitled to a vote. In this case the direct question was presented whether all citizens are necessarily voters. This the court answered by declaring that the United States has no voters of its own creation in the States. After going on to show that at the time the Constitution was adopted and ever since, the right of suffrage in the States had not been coextensive with that of citizenship, the opinion concluded: "For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. . . . Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the constitutions and laws of several States which commit that important trust to men alone are not necessarily void, we affirm the judgment of the court below."

It cannot be said, therefore, that the right to vote either at Federal or State elections is determined by Federal law. Even the Fifteenth and Nineteenth Amendments do not themselves give to any one the right. In *United States v. Reese*¹² the court said: "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen over another, on account of race, color, or previous condition of servitude. . . . It follows that the Amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimi-

¹⁰ *E. g.*, upon aliens who have declared their intention to become citizens but have not yet taken out their final papers. Hare (*American Constitutional Law*, p. 529) denies the constitutionality of this. He says: "Reading the Constitution in the light of the Fifteenth Amendment, the just inference would seem to be that national citizenship is a prerequisite to the right of suffrage." This view is plainly incorrect.

¹¹ 21 Wall. 162.

¹² 92 U. S. 214.

nation in the exercise of the elective franchise on account of race, color or previous condition of servitude."

And in *United States v. Cruikshank*¹³ the court said: "In *Minor v. Happersett* (21 Wall. 162) we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States v. Reese* (92 U. S. 214), just decided, we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States."

In a much later case, *Pope v. Williams*,¹⁴ the court again said: "The privilege to vote in any State is not given by the Federal Constitution or by any of its Amendments."

In *Neal v. Delaware*,¹⁵ a case decided but a little later, the court, however, pointed out that the effect of the Amendment by abolishing *ipso facto* all limitations in State laws and constitutions founded upon race, color, or previous condition of servitude, may in effect be to qualify certain persons to vote who otherwise would not have the right. The opinion said: "Beyond all question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. . . . There is, then, an excision or erasure of the word 'white' in the qualification of voters in this State; and the Constitution is now to be construed as if such word had never been there."

Although, as appears from the foregoing, the right of determining the conditions upon which the suffrage is granted lies exclusively within the discretion of the several States, subject only to the limitations of the Fifteenth and Nineteenth Amendments, it may happen that State suffrage laws will be rendered invalid because in violation of certain other general limitations laid upon the States. Thus, for example, a disfranchising law, operating as to particular individuals as a bill of attainder, or as an *ex post facto* law,^{16a} or as tending to destroy a republican form of government in the State, or as favoring the citizens of certain States above those of other States would probably be held void.

¹³ 92 U. S. 542.

¹⁴ 193 U. S. 621.

¹⁵ 103 U. S. 370.

^{16a} But see *Cummings v. Missouri* (4 Wall. 277) and *Ex parte Garland* (4 Wall. 333) as construed in *Hawker v. New York* (170 U. S. 189).

In *Pope v. Williams* ¹⁶ the court said: "It is unnecessary in this case to assert that under no conceivable state of facts could a State statute in regard to voting be regarded as an infringement upon, or a discrimination against, the individual rights of a citizen of the United States removing into the State, and excluded from voting therein by State legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular State from which the person came, excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other State. In such case an argument might be urged that, under the Fourteenth Amendment of the federal Constitution, the citizen from Georgia was, by the State statute, deprived of the equal protection of the laws. Other extreme cases might be suggested."

In this case the court held valid a State law requiring persons coming into the State to make a declaration of their intention of becoming citizens and residents of the State before they could claim the right to be registered as voters. The court said: "The statute, so far as it provides conditions precedent to the exercise of the elective franchise within the State, by persons coming therein to reside . . . is neither an unlawful discrimination against any one in the situation of the plaintiff in error nor does it deny to him the equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, or a violation of any implied guaranties of the Federal Constitution."

§ 352. Though Determined by State Law, the Right to Vote for Representatives Is a Federal Right.

A distinction is to be made between the right to vote for a member of Congress and the conditions upon which that right is granted. In the preceding section it has been shown that the right to vote is conditioned upon and determined by State law. But the right itself, as thus determined, is a Federal right. That is to say, the right springs from the provision of the Federal Constitution that Representatives shall be elected by those who have the right in each State to vote for the members of the most numerous branch of the State legislature. The Constitution thus gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their several State legislatures. This is the doctrine laid down by the Supreme Court in *Ex parte Yarbrough* ¹⁷ in which it said: "But it is not correct to say that the right to vote for a member of Congress does not depend upon the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election. Its language is:

¹⁶ 193 U. S. 621.

¹⁷ 110 U. S. 651.

'The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for the electors of the most numerous branch of the state legislature.' (Article I, Section 2.) The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election of members of Congress. Nor can they prescribe the qualifications for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right depend exclusively on the law of the State."¹⁸

¹⁸ The opinion continued: "Counsel or petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor v. Happersett* (21 Wall. 162) that "the Constitution of the United States does not confer the right of suffrage upon any one," without reference to the connection in which it is used, insists that the voters in this sense do not owe their right to vote in any sense to that instrument. But the court was combating the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the State for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors. The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States. It is in the following language: Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude. Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

"While it is quite true, as was said by this court in *United States v. Reese* (92 U. S. 214) that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words 'white men' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word 'white,' and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any further constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or

In *Wiley v. Sinkler*,¹⁹ an action brought in one of the Federal Circuit Courts against the board of managers of a general State election to recover damages in the sum of twenty-five thousand dollars for wrongfully rejecting the plaintiff's vote for a member of the House of Representatives of the United States. The defendants demurred on the grounds that the court had no jurisdiction because it did not affirmatively appear on the face of the complaint that a Federal question was involved, and because the verdict for an amount sufficient to give the court jurisdiction would be excessive. Upon error to the Federal Supreme Court, that tribunal held that a Federal right was directly involved for "the right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States."²⁰ The amount of damages claimed, the court held, to be "peculiarly appropriate for the determination of a jury," and that no opinion of the court would "justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court."²¹

By Section 19 of the Criminal Code of the United States it is provided that: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same" they shall be subject to fine and imprisonment and be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

In *United States v. Mosley*,²² it was held that the right to have counted one's vote at an election for a Member of Congress is a Federal right the enjoyment of which Congress has the power to protect, and that a conspiracy of State election officials to omit the returns from their count of certain precincts at such an election and from their return to the State election board was indictable under the provision of the Federal Criminal Code that has been quoted. "It is not open to question," said the court, "that this statute is constitutional, and constitutionally extends some protection, at least, to the right to vote for Members of Congress. . . . We regard it equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in the box."

women. *Neal v. Delaware* (103 U. S. 370). In such cases this Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

¹⁹ 179 U. S. 58.

²⁰ Citing *Ex parte Yarbrough* (110 U. S. 651).

²¹ As to constitutionality of Federal regulation and protection, and the Federal character of the right to vote for Representatives to Congress, see *In re Coy* (127 U. S. 731); *Mason v. Missouri* (179 U. S. 328); *Swafford v. Templeton* (185 U. S. 487).

²² 238 U. S. 383.

§ 352a. Enforcement Clauses of the Fifteenth and Nineteenth Amendments.

By the second sections of the Fifteenth and Nineteenth Amendments Congress is given power to enact laws necessary for the enforcement of the prohibitions expressed in their first sections.

The Federal authority thus granted, it is to be observed, has reference to all elections whether State or Federal. In this respect it is thus much broader than that given in Section IV of Article I. In other respects, however, the power granted is much narrower, for it authorizes Federal intervention only in cases where the right to vote has been denied or abridged on account of race, color, or previous condition of servitude. Thus in *United States v. Reese* ²³ an act of Congress which made it a crime to hinder, delay or restrict any citizen from doing any act to qualify him to vote or from voting at any election, was held void because its operation was not confined to cases in which the interference was on account of race, color, or previous condition of servitude.

In *James v. Bowman*, ²⁴ it was held that the prohibition of the Fifteenth Amendment is directed against State action and that, therefore, there was no constitutional warrant under that Amendment for a Federal statute, applicable to State as well as to Federal elections, which declared punishable the prevention by private persons, acting without any State authority, of persons from exercising the right of suffrage guaranteed by the Amendment. In the instant case the offence charged occurred at or in connection with a congressional election but the court held that, by the statute in question, Congress had not attempted to exercise its general authority to regulate or protect the voter at Federal elections, but, acting in pursuance of an authority claimed to be given by the Fifteenth Amendment, had made its statute applicable to State as well as Federal elections. The court declined, by construing the statute as applicable only to Federal elections, to render it constitutional.

§ 353. Disfranchisement Clauses of the Southern States.²⁵

As has been before adverted to, most, if not all, of the Southern States in which the negro population is very considerable, have, by means of constitutional amendments or in constitutions newly adopted, secured in effect the almost total disfranchisement of their colored citizens. This, however, has been done, not by disfranchisement provisions expressly directed against the negroes, but by requiring all voters to be registered, and by placing conditions upon registration which very few negroes are

²³ 92 U. S. 214; 23 L. ed. 563.

²⁴ 190 U. S. 127.

²⁵ For an excellent account of the devices employed by certain of the States to exclude negroes from the suffrage, see Sait, *American Parties and Elections*, Chapter II.

able to meet, or, at any rate, to satisfy the registration officers that they do meet them.

If the courts may freely go behind the terms of a constitutional clause to discover its intent, and to construe it by that intent, or if they may test its validity by its actual operation in practice, it would seem that a possible opportunity is afforded for holding void some at least of the disfranchising clauses of the Constitutions of the Southern States. As yet, however, no case has been brought before the Supreme Court in which the court has consented to make this examination. As to the circumstances under which the court will consent to go back of the terms of a law, to determine its real intent and effect, two interesting cases are *Yick Wo v. Hopkins*²⁶ and *Williams v. Mississippi*.²⁷ In the former case the law or ordinance in question was held void in that it attempted to give to an administrative officer an arbitrary discretionary power, and also in that an actual arbitrary discriminating use of that authority was shown. In *Williams v. Mississippi* the court declined to hold void the State law in question, the law being upon its face not in violation of the equal protection clause of the Fourteenth Amendment, and no discrimination in fact being proved. In *Yick Wo v. Hopkins* the court said: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution." This doctrine, however, the court said in the *Williams* case is not applicable to the Constitution of Mississippi and its statutes. "They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

In *Giles v. Harris*,²⁸ decided in 1903, a colored citizen of Alabama brought an action in a Federal court against the registrars of his county to compel them to register him as a voter, claiming that the provisions of the Alabama Constitution upon which the registrars based their refusal to register him were in violation of the equal protection clause of the Fourteenth Amendment and of the prohibition of the Fifteenth Amendment. The Supreme Court, to which the case finally came for adjudication, refused the relief prayed, saying: "The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If, then, we accept the conclusion which it is the chief purpose of the bill to

²⁶ 118 U. S. 356.

²⁷ 170 U. S. 213.

²⁸ 189 U. S. 475.

maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? If the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that State constitutions were not left unmentioned in section 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a State, although the State is not and could not be made a party to the bill. (*Hans v. Louisiana*, 134 U. S. 1.) The circuit court has no constitutional power to control its action by any direct means. And if we leave the State out of consideration, the court has as little practical power to deal with the people of the State in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."²⁹

In *Nixon v. Herndon* ^{29a} it was held that a State statute, making negroes ineligible to participate in primary elections of a political party was unconstitutional as denying to negroes the equal protection of the laws. Such denial, it was held, was of such a substantive character as to warrant damages being awarded therefor.

In *Giles v. Teasley*,³⁰ an action was brought to recover damages against the board of registrars for refusing to register the plaintiff as a qualified elector of the State. The Supreme Court of Alabama held that if the provisions of the State Constitution were repugnant to the Fifteenth Amendment they were void and the board of registrars appointed thereunder had no legal existence and had no power to act and would not be liable for a refusal to register the plaintiff; while, on the other hand, if the provisions were constitutional the registrars acted properly thereunder and their action was not reviewable by the courts. The Supreme Court of the

²⁹ Justices Harlan, Brewer, and Brown dissented.

^{29a} 273 U. S. 536.

³⁰ 193 U. S. 146.

United States held that the Alabama court had not decided any Federal question adversely to the plaintiff, and, therefore, that the Supreme Court had no jurisdiction to review the decision of the State court.

In *Jones v. Montague*,³¹ decided in 1904, the court declined to review the dismissal of a petition for a writ of prohibition to prevent the canvass of the votes cast at a congressional election (upon claim that the petitioners had, in violation of the Federal Constitution, been denied registration) for the reason that the canvass had in fact been already made, and certificates of election issued to persons who had been recognized by the House of Representatives as members thereof. The court thus, in any event, not being able to provide any relief, the case became merely a moot one, and as such was dismissed.

In *Myers v. Anderson*,³² it was held that the right to vote secured by the Fifteenth Amendment against denial on account of race, color, or previous condition of servitude, extends to municipal elections, and by a parity of reasoning the same is true of the Nineteenth Amendment as to denial on account of sex.

This case also held that State election officials who, conformably to a State statute, deny to persons the right to vote guaranteed to them by the Amendment, are liable to such persons for the resulting damages as provided in Section 1979 of the Revised Statutes of the United States.³³

In the instant case the court held unconstitutional, as in violation of the Fifteenth Amendment, a Maryland law which, as to municipal elections at the City of Annapolis, directed the registration of, and granted the right to vote to all citizens who, despite their lack of the qualifications otherwise prescribed by the statute, were, prior to January 1, 1868, entitled to vote in the State of Maryland or any other State of the United States at a State election, and upon the lawful male descendants of any person who, prior to that date, was so entitled to vote. A purpose to violate in substance the prohibitions of the Fifteenth Amendment was declared by the court to be clearly evident.

In *Quinn v. United States*³⁴ decided at the same time as *Myers v. Anderson*, the court held that an amendment to the Constitution of the State of Oklahoma was rendered invalid under the Fifteenth Amendment by reason of the exemption from the literacy test for voting of persons, and their lineal

³¹ 194 U. S. 147.

³² 238 U. S. 368.

³³ This statute provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

³⁴ 238 U. S. 347.

descendants, who, on January 1, 1866, or at any time prior thereto, were entitled to vote, or who at that time resided in some foreign country.³⁵

§ 354. Remaining Power of the States to Control the Suffrage and Eligibility to State Offices.

It is reasonably clear that the States still retain power to limit the right of suffrage to particular classes of their citizens except as regards exclusions based upon sex, race, color, or previous condition of suffrage.³⁶ It is barely possible, however, that an exclusion which is wholly unreasonable or arbitrary in character would be held a denial to those excluded of due process of law or the equal protection of the laws, for it has been held that the right to vote is of substantive value for the illegal denial of which compulsory damages may be awarded.³⁷ It might also be argued with some degree of reason that such an arbitrary denial of the right of suffrage to any considerable number of citizens would operate to render the State government no larger republican in form. It would be difficult, however, and probably impossible to obtain a judicial pronouncement upon this point.³⁸

As to eligibility to public office it seems clear that the States have a similar constitutional power, and, moreover, one not limited by the prohibitions of the Fifteenth and Nineteenth Amendments.

§ 355. Federal Control of Congressional Elections.

According to the Constitution, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

In this clause sufficient authority is given the Federal Government, should it so see fit, to assume entire and exclusive control of the elections

³⁵ This "grandfather clause" had not appeared in the original Constitution of the State at the time of its admission to the Union as a State because of a fear that, if it were present, the Constitution would not be acceptable to Congress, and, therefore, the erection of the Territory into a State would not be approved by that body.

³⁶ In *Quinn v. United States* (238 U. S. 347), the court said: "Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals."

³⁷ See *Wiley v. Sinkler* (179 U. S. 58) and *Nixon v. Herndon* (273 U. S. 536).

³⁸ See *ante*, Chapter X.

of Senators and Representatives; to establish by acts of Congress the regulations governing the same, and to apply and enforce these regulations by Federal officials and tribunals.

The United States government did not exercise any of the power thus given it until 1842 when, conceiving that the system employed in some States of electing all the members of the House of Representatives upon a general ticket (that is, one according to which each voter voted for as many Representatives as there were Representatives to be elected from his State) gave an undue power to the political party in the majority in the State, Congress enacted a law declaring that each member should be elected by a separate district composed of contiguous territory.³⁹ In 1866 an act was passed regulating the election of Senators by the State legislatures.⁴⁰

In 1870 Congress, for the first time, enacted laws dealing comprehensively with congressional elections.⁴¹ These acts, as amended and supplemented in 1872,⁴² provided extensive regulations regarding false registration, bribery, voting without legal right, false returns, interfering with officers of election, neglect of duty by such officers, appointment of persons to attend at places of registration and at elections with power to challenge and to witness the counting of votes and to identify signatures of voters, and the preservation of order at elections by special deputy marshals of the United States, with authority to arrest for breaches of the peace committed within their view.

In 1894, however, all of these provisions, with a few exceptions, were repealed.⁴³ There were, however, left in effect the provisions now in Sections 19 to 26, constituting Chapter III of the Criminal Code which is entitled "Offenses Against the Elective Franchise and Civil Rights of Citizens." These provisions, as the title of the chapter shows, have for their purpose the protection of the citizen against the violation of his elective and civil rights, but make no attempt to regulate in an affirmative and specific manner the conduct of congressional elections.

This right of oversight as asserted by Congress in the laws of 1870 and 1872 was contested by some of the States upon the ground that, though the United States might establish regulations of its own, appoint officials to execute them, and compel the officials of the State as well as private citizens to conform to them, it had no right or power to control State officials in the execution of the laws enacted by their own States, even when those laws related to the election of members of the National Legislature.

This controversy reached a judicial settlement in the case of *Ex parte*

³⁹ 5 Stat. at L. 491.

⁴⁰ 14 Stat. at L. 243.

⁴¹ Sections 17-22, act of May 31, 1870, 16 Stat. at L. 144; and Sections 5 and 6 of the act of July 14, 1870, 16 Stat. at L. 256.

⁴² Act of June 10, 1872, 17 Stat. at L. 347.

⁴³ Act of February 8, 1894, 28 Stat. at L. 36.

Siebold,⁴⁴ decided in 1879. This suit arose out of the arrest of certain State-appointed judges of elections who were charged with interfering with and resisting supervisors and deputy marshals holding appointment from the Federal Government under the act of 1870. In behalf of the defendants it was maintained that the Federal officials had been without constitutional authority, and, therefore, that the resistance offered them was not a legal offence.

The argument in support of this view was stated by Justice Field in his dissenting opinion. He there took the position that, in granting to the Federal Government the authority to enact laws regulating the elections of Senators and Representatives, the intention of the framers of the Constitution had been simply to authorize the General Government to legislate in case the State government refused to take any steps whatever. He said: "The act was designed simply to give to the General Government the means of its preservation against a possible dissolution from the hostility of the States to the election of Representatives, or from their neglect to provide suitable means for holding such elections." As evidence that this was the intention, Madison's remarks in the Constitutional Convention and Hamilton's in *The Federalist* were cited. So long as the State laws are retained and administered by State officials, they cannot, argued Field, be properly regarded as Federal laws, and Congress cannot provide for their Federal supervision. "The act of Congress," he said, "asserts a power inconsistent with and destructive of the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence." After quoting from *Kentucky v. Dennison*,⁴⁵ Field continued: "If it be incompetent for the Federal Government to enforce by coercive measures the performance of a plain duty, imposed by a law of Congress upon the executive officer of a State [the rendition of fugitives from justice] it would seem to be equally incompetent for it to enforce by similar measures the performance of a duty imposed upon him by a law of a State. If Congress cannot impose upon a State officer, as such, the performance of any duty, it would seem logically to follow that it cannot subject him to punishment for the neglect of such duties as the State may impose. It cannot punish for the non-performance of a duty which it cannot prescribe. . . . Whenever, therefore, the Federal Government, instead of acting through its own officers, seeks to accomplish its purposes through the agency of officers of the States, it must accept the agency with the conditions upon which the officers are permitted to act. . . . When, therefore, the Federal Government desires to compel, by coercive measures and punitive sanctions, the performance of any duties

⁴⁴ 100 U. S. 371.

⁴⁵ 24 How. 66.

devolved upon it by the Constitution, it must appoint its own officers and agents, upon whom its power can be exerted. . . . Whatever Congress may properly do touching the regulations [governing elections] one of two things must follow: either the altered or the new regulation remains a State law, or it becomes a law of Congress. If it remains a State law, it must, like other laws of the State, be enforced through its instrumentalities and agencies, and with the penalties which it may see fit to prescribe, and without the supervision or interference of Federal officials. If, on the other hand, it becomes a law of Congress, it must be carried into execution by such officers and with such sanctions as Congress may designate. . . . With respect to the election of Representatives," Field concluded, "as long as Congress does not adopt regulations of its own and enforce them through Federal officers, but permits the regulations of the States to remain, it must depend for a compliance with them upon the fidelity of the State officers and their responsibility to their own government. All the provisions of the law, therefore, authorizing supervisors and marshals to interfere with those officers in the discharge of their duties and providing for criminal prosecutions against them in the Federal courts, are, in my judgment, clearly in conflict with the Constitution."

The majority of the court, however, in their opinion said: "There is no declaration that the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power 'to make or alter.'"

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of their respective officers of election, and for their protection in the performance of those duties, the court said: "While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have

shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the State officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or National. Why not? . . . It is objected that Congress has no power to enforce State laws or punish State officers, especially has no power to punish them for violating the laws of their own State. As a general proposition this is, undoubtedly, true; but when, in the performance of their functions, State officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect Representatives to Congress. The due and fair election, of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State government is. It certainly is not obliged to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of elections, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed nature of the transaction, State and National. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for Representatives owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power. The objection that the laws and regulations, the violation of which is made punishable by the Acts of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means for supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not

content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations."

In *Ex parte Clarke*⁴⁶ and *Ex parte Yarbrough*⁴⁷ the doctrine declared in Siebold's case was reaffirmed, the court saying in the latter case, "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect its elections from violence and corruption."

In the Yarbrough case the law of 1870 was held to support an indictment charging a conspiracy to intimidate a citizen of African descent from voting.⁴⁸ The parties interfered with some others not officers of the United States, as in the Siebold case, but this difference, the court held, had no bearing upon the constitutional power of the Federal Government to punish those interfering.

"The power in either case arises out of the circumstances that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely and to protect him from violence while so doing or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."

⁴⁶ 100 U. S. 399.

⁴⁷ 110 U. S. 651.

⁴⁸ "Rev. Stat., § 2208. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same, or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than \$5,000 and imprisoned not more than ten years; and shall, moreover, thereafter be ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

"§ 5520. If two or more persons in any State or Territory conspire to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such advocacy; each of such persons shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

§ 356. Federal Corrupt Practices Act.

Congress has, by various laws, enacted in 1907, 1909, 1910, 1911, 1912 and 1925, provided for the punishment of corrupt practices in congressional elections.⁴⁹ The present act, known as the "Federal Corrupt Practices Act, 1925,"⁵⁰ constitutes Title III of the act of February 28, 1925, reclassifying salaries of postmasters, etc. Its especial purpose is to regulate expenditures and to require that publicity be given to campaign contributions. It furthermore limits the amounts that candidates may lawfully make in their campaigns for election, and declares it unlawful for any candidate, directly or indirectly, to promise or pledge the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment for the purpose of securing support in his candidacy, or to make or offer to make any expenditure, or to cause an expenditure to be made or offered, to any person, either to vote or to withhold his vote, or to vote for or against any candidate, or for any person to solicit, accept or receive any such expenditure in consideration of his vote or the withholding of his vote. State laws relating to the nomination or election of candidates, are declared to be not annulled unless directly inconsistent with the act of Congress.

The constitutional power of Congress to make provision for the fair and honest election of Senators and Representatives, is not open to question. In *Ex parte Coy*,⁵¹ the court said: "The power of Congress to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact whatever is necessary to an honest and fair certification of such election, cannot be questioned. The right to do so, by adopting the statutes of the States, and enforcing them by its own sanctions, is conceded by counsel to be established."⁵²

The Federal Corrupt Practices Act of 1925 is expressly made not applicable to "primary" elections or conventions of political parties.

In *Newberry v. United States*,⁵³ four of the justices declared that it was their opinion that Congress did not have the constitutional power to reg-

⁴⁹ Including special as well as general elections, and the election of a Resident Commissioner by the Philippine Legislature.

⁵⁰ 43 Stat. at L. 1070.

⁵¹ 127 U. S. 731.

⁵² Citing *Ex parte Clarke* (100 U. S. 399).

⁵³ 256 U. S. 232. This case arose out of the conviction of T. H. Newberry and others of conspiring to violate the Federal corrupt practices acts of 1910 and 1911, upon the occasion of the nomination of Newberry as candidate for election to the Senate of the United States. The court did not say that the situation would have been different had the act of Congress been passed after the adoption of the Seventeenth Amendment. The court did, however, refer to the fact that the act antedated that Amendment.

ulate party primaries or conventions held for the purpose of designating candidates at congressional elections. After considering the source and extent of congressional control over elections and the distinction between such elections and the nomination of candidates, these justices said: "Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as a result of his own unsupported ambition does not directly affect the manner of holding the election. . . . Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate, but the authority to regulate the manner of holding them gives no right to control any of these. It is settled, e. g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacture, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress. Elections of Senators by State legislatures presupposed selection of their members by the people; but it could hardly be argued that therefore Congress could regulate such selection." ⁵⁴

Although all of the other justices concurred in the judgment in the Newberry case, four of them declared that the power of Congress did constitutionally extend to the control of primary or nominating elections. The ninth justice expressly reserved his opinion upon this point. It cannot be said, then, that it has been judicially determined whether or not Congress has the power in question, although, as has been pointed out, Congress saw fit expressly to state that its Corrupt Practices Act of 1925 should not apply to party primaries and conventions. Chief Justice White, who was among those justices who upheld the power of Congress, in a vigorous opinion, said of the *contra* opinion: "In the last analysis the contention must rest upon the proposition that there is such absolute want of relation between the power of the government to regulate the right of the citizen to seek a nomination for a public office and its authority to regulate the election after nomination that a paramount government authority having the right to regulate the latter is without any power as to the former. The influence of who is nominated for elective office upon the result of the election to fill that office is so known by all men that the proposition may be left to destroy itself by its own statement. Moreover, the proposition, impliedly at least, excludes from view the fact that the powers conferred upon Congress by the Constitution carry with them the right 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' " ⁵⁵

⁵⁴ Citing *Kidd v. Pearson* (128 U. S. 1).

⁵⁵ For a strong argument in favor of the constitutionality of Federal regulation of congressional elections, see the article by Senator Borah in *The Baltimore Sun* of November 8, 1926.

In *United States v. Gradwell*,⁵⁶ decided in 1919, the court had refused to hold that the provisions of Section 19 of the Criminal Code of the United States had application to primary elections for the nomination of candidates for the United States Senate. In the course of its opinion the court had declared: "Primary elections, such as it is claimed the defendants corrupted, were not only unknown when the Constitution was adopted, but they were equally unknown for many years after the law, now § 19, was first enacted. They are a development of comparatively recent years, designed to take the place of the nominating caucus or convention, as these existed before the change, and even yet the new system must be considered in an experimental stage of development, under a variety of state laws.

"The claim that such a nominating primary, as distinguished from a final election, is included within the provision of the Constitution of the United States, applicable to the election of Senators and Representatives, is by no means indisputable. Many State supreme courts have held that similar provisions of State Constitutions relating to elections do not include a nominating primary. *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036; *Montgomery v. Chelf*, 118 Ky. 766, 82 S. W. 388; *State ex rel. Von Stade v. Taylor*, 220 Mo. 619, 119 S. W. 373; *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728; *Gray v. Seitz*, 162 Ind. 1, 69 N. E. 456; *State ex rel. Nordin v. Erickson*, 119 Minn. 152, 137 N. W. 385.

"But even if it be admitted that, in general, a primary should be treated as an election within the meaning of the Constitution, which we need not and do not decide, such admission would not be of value in determining the case before us, because of some strikingly unusual features of the West Virginia law under which the primary was held, out of which this prosecution grows. By its terms this law provided that only candidates for Congress belonging to a political party which polled 3 per cent of the vote of the entire State at the last preceding general election could be voted for at this primary, and thereby, it is said at the bar, only Democratic and Republican candidates could be and were voted for, while candidates of the Prohibition and Socialist parties were excluded, as were also independent voters who declined to make oath that they were 'regular and qualified members and voters' of one of the greater parties. Even more notable is the provision of the law that, after the nominating primary, candidates, even persons who have failed at the primary, may be nominated by certificate signed by not less than 5 per cent of the entire vote polled at the last preceding election. Acts West Va. 1915, chap. 26, pp. 222, 246.

"Such provisions as these, adapted though they may be to the selection of party candidates for office, obviously could not be lawfully applied to a final election at which officers are chosen, and it cannot reasonably be said

⁵⁶ 243 U. S. 476.

that rights which candidates for the nomination for Senator of the United States may have in such a primary under such a law are derived from the Constitution and laws of the United States. They are derived wholly from the State law, and nothing of the kind can be found in any Federal statute. Even when Congress assumed, as we have seen, to provide an elaborate system of supervision over congressional elections, no action was taken looking to the regulation of nominating caucuses or conventions, which were the nominating agencies in use at the time such laws were enacted.

"What power Congress would have to make regulations for nominating primaries, or to alter such regulations when made by a State, we need not inquire. It is sufficient to say that as yet it has shown no disposition to assume control of such primaries or to participate in them in any way, and that it is not for the courts, in the absence of such legislation, to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended."

§ 357. The Power of the United States to Compel the Election by the States of Representatives to Congress, Senators and Presidential Electors.

It has at times been suggested that the States might, if they should so choose, destroy the Federal Government by a refusal to select Presidential Electors, Representatives to Congress and Senators. In the case of Representatives, should the States refuse to take action, their election could, as we have seen, be directly undertaken by the Federal Government. As regards Senators and Presidential Electors, however, the Federal Government could not itself undertake their election, and it is difficult to suggest legal means by which State action could be compelled. In *Cohens v. Virginia*,⁵⁷ Barbour, arguing in behalf of the position which had been taken by Virginia, declared: "Whenever the States shall be determined to destroy the Federal Government, they will not find it necessary to act, and to act in violation of the Constitution. They can quietly accomplish the purpose by not acting. Upon the State legislatures it depends to appoint the Senators and Presidential Electors, or to provide for their election. Let them merely not act in these particulars, the executive department and part of the legislature ceases to exist, and the Federal Government thus perishes by a sin of omission not of commission." To this position Webster alluded in his speech in reply to Calhoun, and endeavored to minimize its importance from the States' Rights standpoint. "I hear it often suggested," he said, "that the States, by refusing to appoint Senators and Electors, might bring this government to an end. Perhaps this is true; but the same may be said of the State governments themselves. Suppose the legislature of a State, having the power to appoint the governor and the judges, should

⁵⁷ 6 Wh. 264.

omit that duty, would not the State government remain unorganized? No doubt, all elective governments may be broken up by a general abandonment on the part of those entrusted with political powers, of their appropriate duties." Moreover, as a matter of fact, as Webster went on to show, in a certain very important sense the Federal Constitution relies, for the maintenance of the government which it establishes, upon the plighted faith not of the States, as States, but upon the several oaths of its individual citizens, in that all members of a State legislature are obliged, as a condition precedent to their taking their seats, to swear to support the Federal Constitution, and from the obligation of this oath no State power can discharge them. Thus, said Webster, "no member of a State legislature can refuse to proceed at the proper time to elect Senators to Congress, or to provide for the choice of Electors of President and Vice-President, any more than the members of this body [Senate] can refuse, when the appointed day arrives, to meet the members of the other House, to count the votes for those officers, and to ascertain who are chosen. In both cases, the duty binds, and with equal strength, the conscience of the individual member, and it is imposed on all by an oath in the very same words. Let it then never be said, Sir, that it is a matter of discretion with the States whether they will continue the government, or break it up by refusing to appoint Senators and Electors. They have no discretion in the matter. The members of the legislatures cannot avoid doing either, so often as the time arrives, without a direct violation of their duty and their oaths; such a violation as would break up any other government."

The correctness of the reasoning of Webster may be granted, and yet the fact remains that however great a moral obligation there may be upon the individual members of the several State governments to take such action as is necessary to equip the Federal Government with the officials necessary for its operation, there exists no legal means, by an issue of mandamus or otherwise, to compel such action when refused.

§ 358. Election of Senators.

Prior to the adoption of the Seventeenth Amendment the Constitution provided that Senators in the Federal Congress shall be chosen by the legislatures of the several States, and that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but that Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Not until 1866 did Congress exercise the control over the election of Senators thus given it. Prior to that date the Senate had recognized the validity of elections based on majority votes in joint conventions of the two Houses of the State legislatures, where a concurrent choice of the two Houses sitting separately was not obtained. It was held, however, in the

case of James Harlan, 1857, that in such joint conventions a quorum of both Houses must be present.

By the act of 1866 the entire matter was Federally determined.⁵⁸

In the case of James B. Eustis, the Senate held that, under this law, an election made by a majority vote in a joint convention was valid, even though there was not present a quorum of one of the Houses.

§ 359. Popular Election of Senators.

The Seventeenth Amendment, adopted in 1913, reads as follows:

“(1) The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

“(2) When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies; *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

“(3) This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.”

Some occasions for controversy have arisen under Section 3 of this Amendment, but otherwise the Amendment has not given rise to judicial or congressional determinations that need to be here considered.⁵⁹

§ 360. Vacancies in the Senate.

It is provided by Article I, Section 3, Clause 2 of the Constitution that “if vacancies happen [in the Senate] by resignation, or otherwise, during the recess of the legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.”

This provision has, of course, been superseded by Section 2 of the Seventeenth Amendment, but, inasmuch as that section employs the same phraseology as to the “happening” of vacancies, the interpretation that has been given to Clause 2 of Section 3, Article I is still of precedential force.

There has been considerable difference of opinion as to the proper construction to be given to the term “happen” as employed in the fore-

⁵⁸ Rev. Stat., §§ 14-19.

⁵⁹ As to controversies which arose with reference to the appointment of F. P. Glass as Senator from Alabama, see Sen. Docs. 170, 164, and 241, 63d Cong., 1st Sess. As to the election of Blair Lee as Senator from Maryland, see Senate Rep. 160, 63d Cong., 2d Sess., Parts 1, 2 and 3.

going constitutional clause. By some it has been contended that a vacancy "happens" whenever, for any reason whatever, there is a vacancy in the representation of a State in the Senate. By others, it is asserted, that where a State legislature has had the opportunity to elect a Senator and has failed to do so, it cannot be said that a vacancy has "happened" but that it has been present and brought about by the non-action of the State electoral body, and that that body had thus impliedly shown that it did not desire the vacancy to be filled. This was the position taken by the Senate in 1900 in the case of Senator Quay from Pennsylvania. The Committee on Privileges and Elections, in its report to the Senate recommending this action, after stating the facts, said: "It will thus be seen that the vacancy, which the Governor of Pennsylvania has here attempted to provide for by a temporary appointment, was one which was foreseen, one which was caused by the expiration of a prior term, one which occurred while the legislature of Pennsylvania was in session, and one which that legislature had an opportunity of filling before it occurred, in the *interim* between the date of the occurrence and the appointment of the Governor. Under these facts we think that the appointment is invalid. . . . After a vacancy in the office of United States Senator occurs or comes to pass, if the next legislature does not fill it, it continues to exist. It is the same vacancy, not a new one. Now the State executive is given power to make temporary appointments in case of a vacancy not as long as it continues or exists, but only until the next meeting of the legislature, which is then required to fill the vacancy. This clearly means that the paramount intent to have the legislature choose the Senators is to prevail, and that, whenever the legislature has had the opportunity to fill the vacancy, either before or after it occurs, the executive has no power to appoint."⁶⁰

The senatorial practice has not been uniform in respect to executive appointments to fill vacancies, but its action in the Quay case has probably determined the doctrine for the future.

§ 361. Vacancies in the House of Representatives.

When vacancies happen in the representation from any State, it is provided that the executive authority thereof shall issue writs of election to fill such vacancies.

Vacancies are occasioned by death, by resignation, or by acceptance of a disqualifying office.⁶¹

⁶⁰ Sen. Rpt. 153, 56th Cong., 1st Sess.

⁶¹ Van Ness Case (Cl. & H. 122).

CHAPTER XL

THE PROCESS OF LEGISLATION AS CONSTITUTIONALLY DETERMINED

§ 362. Constitutional Provisions.

To a certain extent the manner of conducting business in Congress, and the processes of legislation, are determined by the Constitution. It is provided that the Vice-President shall be the president of the Senate, but shall have no vote except in case of a tie. The Senate, however, is empowered to choose its other officers, including the president *pro tempore*¹ to preside in the absence of the Vice-President or when he is exercising the office of President of the United States. The House is empowered to choose all of its officers, including its presiding officer, the Speaker.

It is required that Congress shall assemble at least once in every year, and that such meeting shall be on the first Monday in December, unless by law a different day is appointed.

A majority of each House is fixed as a quorum to do business, but a smaller number is competent to adjourn from day to day, and to compel the attendance of absent members in such manner and under such penalties as each House may provide.

Each House is authorized to determine the rules of its procedure, to punish its members for disorderly behavior, and, as we have seen, with the concurrence of two-thirds to expel a member.

Neither House may, without the consent of the other House, during a session of Congress adjourn for more than three days, nor to any other place than that in which the Houses are sitting.

Each House is required to keep a journal of its proceedings, and from time to time to publish the same, excepting such parts as may in its judgment require secrecy; and it is ordered that, at the desire of one-fifth of those present, the yeas and nays of members of either House on any question shall be entered on this journal.

The foregoing constitutional provisions impose duties upon and grant powers to the two Houses of Congress, the fulfilment and exercise of which are placed within the discretion of the Houses themselves. Very few questions arising under these clauses have, therefore, been, or could have been, brought before the courts. One important point has, however, been raised and deserves attention. This is discussed in the next section.

¹ See Sen. Doc. 30, 62d Cong., 1st Sess., for discussion of the office of President *Pro Tempore* of the Senate.

§ 363. Conclusiveness of the Records of Congressional Proceedings.

In a few instances the validity of laws purporting to have been enacted by Congress has been questioned upon the ground that they have not, in fact, been enacted by that body in accordance with the requirements of the Constitution. This is determinable only by an examination of the records of the proceedings of Congress and raises the question as to the evidential value to be given to those records.

In *Field v. Clark*² it was contended by the appellants that an enrolled act in the custody of the Secretary of State, and appearing upon its face to be a law enacted by Congress, was a nullity, because, as was shown by the records of proceedings in Congress, and the reports of committees, including that of the committee on conference, a section of the bill as finally passed was not in the bill authenticated by the signatures of the presiding officers of the two Houses and signed by the President. The court, however, declared that the attestation of the Speaker of the House and of the President of the Senate, the signature of the President of the United States, and the deposit of a measure as a law in the public archives are to be taken as unimpeachable evidence that the constitutional requirements for legislation have been satisfied, and that the measure as thus certified to has received the approval of the legislative branch of the government. The opinion concluded: "We are of the opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either House, from the reports of committees, or from other documents, printed by authority of Congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled Act in the custody of the State Department."

In *United States v. Ballin*³ the evidential value of records of congressional proceedings was again considered. The points involved and their decision sufficiently appear from the following quotation from the opinion: "Two questions only are presented: first, was the Act of May 9, 1890, legally passed and, second, what is the meaning? The first is the important question. The enrolled bill is found in the proper office, that of the Secretary of State, authenticated and approved in the customary and legal form. There is nothing on the face of it to suggest any invalidity. Is there anything in the facts disclosed by the journal of the House, as found by the general appraisers, which vitiates it? We are not unmindful of the general observations found in *Gardner v. Barney* (6 Wall. 499) 'that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for

² 143 U. S. 649.

³ 144 U. S. 1.

that which in its nature is most appropriate, unless the positive law has enacted a different rule.' And we have at the present term, in the case of *Field v. Clark*, had occasion to consider the subject of an appeal to the journal in a disputed matter of this nature. It is unnecessary to add anything here to that general discussion. The Constitution (Article I, Section 5) provides that 'each House shall keep a journal of its proceedings'; and that 'the yeas and nays of the members of either House on any question shall at the desire of one-fifth of those present, be entered on the journal.' Assuming that by reason of this latter clause reference may be had to the journal, to see whether the yeas and nays were ordered, and if so what was the vote disclosed thereby; and assuming, though without deciding, that the facts which the Constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted, yet if reference may be had to such journal, it must be assumed to speak the truth. It cannot be that we can refer to the journal for the purpose of impeaching a statute properly authenticated and approved and then supplement and strengthen that impeachment by parol evidence that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force to the impeachment."⁴

In *Flint v. Stone Tracy Co.*,⁵ the court, though referring to Journals of Congress as showing the House in which an act had originated, said: "In thus deciding we do not wish to be regarded as holding that the Journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate, and approved by the President, and duly deposited with the State Department."⁶ It is difficult, however, to see how the court will be otherwise able to satisfy itself as to whether acts of Congress in the process of their enactment have conformed to constitutional requirements. The only other alternative is for the court to hold that the fact that a law has been signed by the presiding officers of the two Houses, approved by the President, and

⁴ With reference to laws of the States, the Supreme Court in *Duncan v. McCall* (139 U. S. 449) said: "It is unnecessary to enter upon an examination of the rulings in the different States upon the question whether a statute duly authenticated, approved and enrolled can be impeached by resort to the journals of the legislature, or other evidence, for the purpose of establishing that it was not passed in the manner prescribed by the State Constitution. The decisions are numerous and the results reached fail of uniformity. The courts of the United States necessarily adopt the adjudication of the State courts on the subject" [citing cases]. For a strong State case holding that legislative records may be resorted to, see *Neiberger v. McCullough* (97 N. E. 660) (Illinois).

⁵ 220 U. S. 107.

⁶ Citing *Marshall Field & Co. v. Clark* (134 U. S. 649); *Harwood v. Wentworth* (162 U. S. 547); *Twin City Bank v. Nebeker* (167 U. S. 196). In the instant case, the court did not itself consult the Journals, but accepted as correct statements in counsel's brief to which no objection had been made by counsel upon the other side. But these statements must have been based upon the Journals.

by him deposited as a statute with the Department of State, is conclusive evidence that all the constitutional requirements regarding the processes of legislation,—existence of a quorum, the necessary approving vote, etc., — have been observed.

§ 364. Constitutional Force of Rules of the House and Senate.

In *United States v. Ballin* was also raised an interesting question as to the constitutional validity of a certain rule of procedure adopted by the House of Representatives. As to this the court, in its opinion, said: "The Constitution . . . provides, that 'each House may determine the rules of its proceedings.' It appears that, in pursuance of this authority, the House had, prior to that day, passed this as one of its rules: Rule XV. 'On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the House who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the persons voting, and be counted and announced in determining the presence of a quorum to do business.' (House Journal, 230, Feb. 14, 1890.) The action taken was in direct compliance with this rule. The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the Speaker or clerk of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other method would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal. The Constitution provides that 'a majority of each [House] shall constitute a quorum to do business.' In other words, when a majority are present, the House is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and when that majority are present the power of the House arises. But how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination,

and it is therefore within the competence of the House to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the Speaker and the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the House may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the House is in a condition to transact business. As it appears from the journal, at the time this bill passed the House there was present a majority, a quorum, and the House was authorized to transact any and all business. It was in a condition to act on the bill if it desired. The other branch of the question is, whether, a quorum being present, the bill received a sufficient number of votes; and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body."

In *Hubbard v. Lowe*,⁷ a Federal District Court held invalid the Cotton Futures Act of 1914 upon the ground that, though a revenue measure, it had not originated in the House of Representatives. The court said: "When the Congress, through its proper officials, certifies that it has gone through the forms of law-making in violation of an express constitutional mandate, is the result a law at all? Of course it is not; the question answers itself, unless there be some different treatment due to an act created in a fundamentally illegal manner and that accorded to one created for an unconstitutional purpose. There can be no such difference logically. Any and all violations of constitutional requirements vitiate a statute, and has been so held in three States.⁸ It has not heretofore been found necessary to condemn an Act of Congress for this kind of careless journey work, though it has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a bill for raising revenue. . . . Defendant has urged upon the Court that in *Rainey v. United States*⁹ the Supreme Court declined to state that there was a judicial power after an Act of Congress had been duly promulgated to inquire in which House it originated for the purpose of determining its

⁷ 226 Fed. 135.

⁸ Successor of *Givanovich* (50 La. Ann. Pt. 1, 625, 24 South, 679); *Succession of Sala* (50 La. Ann. Pt. II, 1018, 24 South, 674); *Perry Co. v. Selma*, etc. R. R. (58 Ala. 546); *Thierman Co. v. Commonwealth* (123 Ky. 740, 97 S. W. 366).

⁹ 232 U. S. 617.

validity. There was nothing in the Rainey case requiring decision on the point here raised which is not (under the reasoning in *Field v. Clark*),¹⁰ an inquiry as to the House of origin of the Cotton Futures Act. No inquiry is necessary. The certificate of Congress, the enrolled Act and Statutes at Large all proclaim the House in which Congress thought this bill originated, wherefore the sole question here is as to the effect of such a proclamation of unconstitutional action." In other words, it was not necessary in this case for the court to examine the legislative records.

§ 365. Revenue Measures.

The Constitution provides that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

This provision has given rise to frequent controversies between the two Houses of Congress, but has but seldom been passed upon by the courts. No formal definition of a revenue measure has been given by the Supreme Court, but in *Twin City National Bank v. Nebeker*¹¹ the court, in effect, held that a bill, the primary purpose of which is not the raising of revenue, is not a measure that must originate in the House, even though, incidentally, a revenue will be derived by the United States from its operation.

The House has, upon a number of occasions,¹² refused to agree to or consider senatorial amendments to revenue measures upon the ground that the amendments have enlarged the scope or changed the character of the measure as originated in the House. The views held by the House and the Senate, respectively, regarding what, in specific instances, should properly be termed revenue measures and what proper amendments thereto, do not need to be stated in this treatise. They are set out at length in Mr. Hinds' treatise. Especially the House has denied, and the Senate has insisted upon, its right to originate measures which repeal a law or portion of a law imposing taxes, duties, imposts or excises.

In *Flint v. Stone Tracy Co.*¹³ one of the grounds upon which was questioned the so-called Federal Corporation Tax Law, which constituted a section of the Tariff Act of August 5, 1909, was that it was a revenue measure and had originated in the Senate. The court, however, dismissing this contention, called attention to the fact that this section was by way of amendment of the tariff law which had originated in the House, and said: "The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner in which it was in this case. The

¹⁰ 143 U. S. 649.

¹¹ 167 U. S. 196.

¹² See Hinds, *Precedents of the House of Representatives*, Chapter XLVII.

¹³ 220 U. S. 107.

amendment was germane to the subject matter of the bill and not beyond the power of the Senate to propose.”

§ 366. Appropriation Acts.

It would seem that the Senate has full power to originate measures appropriating money from the Federal treasury. This right has at times been denied by certain members of the House,¹⁴ but the House has not itself formally adopted this negative view. In practice, however, all the more important appropriation acts originate in the House.

§ 367. Presidential Participation in Law Making.

The duties and powers of the President with reference to the enactment of laws are stated in Clause 2 of Section VII of Article I of the Constitution. This clause reads: “Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.”

In an earlier chapter¹⁵ it has been pointed out that the foregoing provisions have no application to amendments to the Constitution proposed by Congress to the States for their approval or disapproval.

Legislative practice, approved by the Supreme Court in *Missouri Pacific Ry. Co. v. Kansas*¹⁶ has determined that the two-thirds vote of each House required to pass a bill over the President's veto is two-thirds of a quorum and not of the entire membership. The court said: “As the context leaves no doubt that the provision was dealing with the two Houses as organized and entitled to exert legislative power, it follows that to state the contention is to adversely dispose of it. . . . The identity between the provision of Article V of the Constitution, giving the power by a two-

¹⁴ See especially the views of the minority in House Report No. 147, 46th Cong., 3d Sess.; also Hinds, § 1500. Also Sen. Doc. 872, 62d Cong. 2d. Sess.

¹⁵ *Ante*, § 329.

¹⁶ 248 U. S. 276.

thirds vote to submit amendments, and the requirement we are considering as to the two-thirds vote necessary to override a veto makes the practice as to the one applicable to the other.”¹⁷

It is clear that the power given to the President with reference to the vetoing of measures of Congress is one that, as a matter of propriety as well as of constitutional right, he may exercise upon any grounds he may deem sufficient; thus the power may be exercised by the President not only to protect himself, or rather his office, against unconstitutional diminution or increase of authority, to check legislation which he deems to be practically inexpedient, or which, as he thinks, does not represent the true will of the American people, or to prevent placing upon the statute books legislation which, in his opinion, is, for any reason, unconstitutional. There have been some who have objected to the exercise of the veto power upon this last ground, as being an assumption of a right to decide a question which should be left to the courts. The author of the present treatise is, however, of the opinion that this position is not a valid one and agrees with President Taft when, in his message to Congress of February 28, 1913, disapproving, as unconstitutional, the Webb-Kenyon Bill in regulation of interstate shipments of intoxicating liquors, he said:

“But it is said that this is a question with which the Executive or Members of Congress should not burden themselves to consider or decide. It is said that it should be left to the Supreme Court to say whether this proposed act violates the Constitution. I dissent utterly from this proposition. The oath which the chief Executive takes, and which each Member of Congress takes, does not bind him any less sacredly to observe the Constitution than the oaths which the Justices of the Supreme Court take. It is questionable whether the doubtful constitutionality of a bill ought not to furnish a greater reason for voting against the bill, or vetoing it, than for the court to hold it to be invalid. The court will only declare a law invalid where its unconstitutionality is clear, while the lawmaker may very well hesitate to vote for a bill if of doubtful constitutionality, because of the wisdom of keeping clearly within the fundamental law. The custom of legislators and executives having any legislative functions to remit to the courts entire and ultimate responsibility as to the constitutionality of the measures which they take part in passing is an abuse which tends to put the court constantly in opposition to the Legislature and Executive, and, indeed, to the popular supporters of unconstitutional laws. If, however, the legislators and the executives had attempted to do their duty, this burden of popular disapproval would have been lifted from the courts, or at least considerably lessened.

¹⁷ The opinion further refers to the fact that, in every case in which the question has arisen in the State courts with reference to the overriding of gubernatorial vetoes, the decision has been the same.

"For these reasons, and in spite of the popular approval of this bill, I have not felt justified in signing it, because I feel that under principles of proper constitutional construction it violates the inter-State commerce clause of our fundamental law."

§ 368. Resolutions.

In the Fifty-fourth Congress, 2d Session, the Senate Committee on the Judiciary was requested to report whether a certain resolution mentioned in a law should be in the form of a "joint resolution," and whether it was necessary that "concurrent resolutions" should be submitted to the President of the United States.

In its report the committee, while admitting that Clause 3, Section VII of Article I of the Constitution, literally applied, would make it necessary that every joint or concurrent resolution of Congress, whatever its substance or intent, would have to be submitted to the President for his approval, went on to say that the Constitution must look beyond the mere form of a resolution, to its subject-matter, and that the words "to which the concurrence of the Senate and House of Representatives may be necessary" are to be construed to relate only to matters of legislation to which the concurrent action of both Houses is by the Constitution made absolutely necessary; in short, only to legislative measures. Thus, in general, joint resolutions need to be sent to the President; concurrent resolutions do not. Of these latter the committee said: "For over a hundred years . . . they have never been so presented. They have uniformly been regarded by all the Departments of the Government as matters peculiarly within the province of Congress alone. They have never embraced legislative decisions proper, and hence have never been deemed to require executive approval. This practical construction of the Constitution, thus acquiesced in for a century, must be deemed the true construction with which no court will interfere."

§ 369. Parts of Bills May Not Be Vetoed.

In those States whose Constitutions have not expressly given the executive the power to approve parts, and disapprove the remainder of bills, it has been uniformly held that he has not the power. When, however, he has attempted to do so, the decisions have been in conflict as to whether such partial approval is no approval at all and amounts to a veto, or whether the entire measure is to be treated as approved, the disapproval of the parts being considered a nullity.¹⁸

§ 370. Riders.

The Federal Executive has never attempted the exercise of, or claimed, the right to veto parts of measures submitted to him by Congress, and to

¹⁸ See Art. by Jas. D. Barnett, "The Executive Control of the Legislature," *Am. Law Rev.*, XLI, 384.

approve the remainder. Because thus bound to accept or reject a bill as a whole, Congress has at times attempted to force the hand of the President by incorporating into a measure which it is known he will feel almost obligated to sign, provisions which it is believed he would disapprove if submitted to him as independent propositions. At times, however, these so-called "riders" have led to the veto of the entire bill. President Hayes returned without his approval several appropriation bills which contained legislation which was not agreeable to him. President Johnson returned the act of March 2, 1867 (Army Appropriation Bill), with his signature, but in a message of protest said: "These provisions are contained in the second section, which in certain cases virtually deprives the President of his constitutional functions as commander-in-chief of the army, and in the sixth section which denies to ten States of the Union their constitutional right to protect themselves in any emergency, by means of their own militia. These provisions are out of place in an appropriation act. I am compelled to defeat these necessary appropriations if I withhold my signature from the act."

§ 371. Secret Statutes of the United States.

It will probably be a surprise to most persons to learn that there have been a few statutes enacted by Congress, which, for political reasons, have, for a time, not been published, but kept secret.¹⁹

§ 372. May Bills Be Signed by the President After the Adjournment, Final or Intermediate, of Congress?

As appears from the constitutional provision which has been quoted, a measure, if not returned to Congress within ten days, Sundays excepted, becomes a law without the President's signature. If, however, Congress adjourns before the expiration of the ten days, the measure does not become a law and this is known as a pocket veto. The question has, however, been several times raised whether the President may not, if he desires the bill to become a law, sign after the adjournment of Congress, whether intermediate or at the termination of the Congress.

In 1824 President Monroe by inadvertence failed to sign a bill before the adjournment of Congress and the question was discussed by his Cabinet as to his right to sign, notwithstanding the adjournment. Some difference of opinion being manifested, the President decided not to sign.

In 1863 President Lincoln signed a bill eight days after Congress had adjourned. At the next session of Congress the Judiciary Committee of the House, having been instructed to consider the constitutionality of this, unanimously reported that the bill was not a law. No action was taken by

¹⁹ See the confidential memorandum, prepared for official use by David H. Miller, and published in 1918 by the Department of State.

the House upon this report, but later substantially the same measure was reenacted by Congress and signed by the President. The committee, in its report referred to, said: "The ten days' limitation . . . refers to the time during which Congress remains in session, and has no application after adjournment. Hence if the Executive can hold a bill ten days after adjournment and then approve it, he can as well hold it ten months before approval. This would render the laws of the country uncertain and could not have been intended by the framers of the Constitution. The spirit of the Constitution evidently requires the performance of every act necessary to the enactment and approval of laws to be perfect before the adjournment of Congress."²⁰

Notwithstanding the precedents and arguments which have been stated, President Wilson, in June, 1920, supported by an opinion from the Attorney General as to his constitutional power to do so, signed a number of bills after the adjournment of Congress.²¹

The most recent development of this controversy is that exhibited by the passing, on February 26, 1927, of a resolution declaring that a measure entitled "An Act to Carry into Effect the Twelfth Article of the Treaty between the United States and the Shawnee Tribe of Indians," passed by both Houses and sent to the President on the day of the adjournment of the first session of the Sixty-Ninth Congress, but not signed or returned to Congress by the President with his disapproval had become a law. The Judiciary Committee of the House, in a report made to that body, declared the doctrine that, under Article I, Section 7, Clause 2 of the Constitution, it was only the final adjournment of a Congress, and not the adjournment of one of its earlier sessions which would prevent the President from returning a bill sent to him, and that, therefore, the bill in question, not having been returned by the President, was to be regarded as having become a law. In this report the Committee conceded that the precise

²⁰ In *United States v. Weil* (29 Ct. of Cl. 523) the Court of Claims held that the Supreme Court had impliedly upheld the earlier act, signed after adjournment, by passing upon claims arising under it. However, it is to be observed that the act was valid upon its face, and the point as to the date of its signature was not raised, and the court was not obliged to take judicial cognizance of it.

Professor Barnett in an article in the *Am. Law Rev.*, XLI, 230, entitled "The Executive Control of the Legislature," and Mr. Renick in an article in the same journal, XXXII, 208, entitled "The Power of the President to Sign Bills after the Adjournment of Congress," give a full discussion of this subject. They show that the decisions of the State courts with reference to the signing of State bills by the governor after legislative adjournment are in conflict, with the balance of authority, however, in support of the practice.

²¹ For an able discussion of this question and of the precedents Federal and State, see the article "The Power of the President to Sign Bills After Congress Has Adjourned" by Professor Lindsay Rogers in the *Yale Law Journal*, Vol. XXX (November, 1920), p. 1.

question had never been determined in the Federal courts, but referred to various cases in both Federal and State courts in which it had been held that a bill might be approved by the President or State Governor during a legislative recess, and argued that logic would suggest that the same rule should be applicable as to the period between the sessions of the same Congress. Quoting from a brief prepared by the Legislative Reference Service of Congress, the Committee said: "As far as legislative procedure is concerned, there is a significant difference between a temporary adjournment for a few days, or even the adjournment of a legislative session, as contrasted with the adjournment that marks the formal termination of a definite Congress or legislature. A new Congress necessitates the election of new officers and a new legislative program. In the case of a mere adjournment of a legislative session there is only an interruption of legislative activity; the same legislative officers continue in office for the subsequent session, and the unfinished legislative measures of the previous session are brought to completion."^{21a}

§ 373. Signing of Bills during Recess of Congress.

In the *Weil* case the court argued that the President might sign during a recess of Congress even if he might not sign after its adjournment, and this proposition was upheld by the Supreme Court in *La Abra Silver Mining Co. v. United States*.²²

^{21a} House Rpt. No. 2054, 69th Cong., 1st Sess. The Court of Claims in a recent case (*Okanogan Indians v. U. S.*) had held that bills not signed or returned to Congress by the President within ten days after adjournment of Congress, whether of the last or earlier session, did not become laws.

²² 175 U. S. 423. "The ground of this contention is that having met in regular session at the time appointed by law, the first Monday of December, 1892, and having on the 22d of that month (two days after the presentation of the bill to the President) by the joint action of the two Houses taken a recess to a named day, January 4, 1893, Congress was not actually sitting when the President, on the 28th day of December, 1892, by signing it, formally approved the act in question. The proposition, plainly stated, is that a bill passed by Congress and duly presented to the President does not become a law if his approval be given on a day when Congress is in recess. This implies that the constitutional power of the President to approve a bill so as to make it a law is absolutely suspended while Congress is in recess for a fixed time. It would follow from this that if both Houses of Congress by their joint or separate action were in recess from some Friday until the succeeding Monday, the President could not exercise that power on the intervening Saturday. Indeed, according to the argument of counsel the President could not effectively approve a bill on any day when one of the Houses, by its own separate action, was legally in recess for that day in order that necessary repairs be made in the room in which its sessions were being held. Yet many public acts and joint resolutions of great importance, together with many private acts, have been treated as valid and enforceable, which were approved by the President during the recesses of Congress covering the Christmas holidays. In the margin will be found a reference to some of the more recent of those statutes. Do the words of the Constitution, reasonably interpreted, sustain the views advanced for appellant? . . . It is said

§ 374. Constitutionality of a National Referendum.

The constitutional power of Congress to provide for a national vote upon a legislative proposal has been at times mooted, although never attempted. It would seem to be clear that under the rule of *delegatus non potest delegare* Congress could not constitutionally give legislative force to a national vote, but that it could avail itself of such a vote in order to guide itself as to what

that the approval by the President of a bill passed by Congress is not strictly an executive function, but is legislative in its nature; and this view, it is argued, conclusively shows that his approval can legally occur only on a day when both Houses are actually sitting in the performance of legislative functions. Undoubtedly the President when approving bills passed by Congress may be said to participate in the enactment of laws which the Constitution requires him to execute. But that consideration does not determine the question before us. As the Constitution, while authorizing the President to perform certain functions of a limited number that are legislative in their general nature, does not restrict the exercise of those functions to the particular days on which the two Houses of Congress are actually sitting in the transaction of public business, the court cannot impose such a restriction upon the Executive. It is made his duty by the Constitution to examine and act upon every bill passed by Congress. The time within which he must approve or disapprove a bill is prescribed. If he approve a bill, it is made his duty to sign it. The Constitution is silent as to the time of his signing, except that his approval of a bill duly presented to him—if the bill is to become a law merely by virtue of such approval—must be manifested by his signature within ten days, Sundays excepted, after the bill has been presented to him. It necessarily results that a bill when so signed becomes from that moment a law. But in order that his refusal or failure to act may not defeat the will of the people, as expressed by Congress, if a bill be not approved and be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him. We perceive nothing in these constitutional provisions making the approval of a bill by the President a nullity if such approval occurs while the two Houses of Congress are in recess for a named time. After the bill has been presented to the President, no further action is required by Congress in respect of that bill, unless it be disapproved by him and within the time prescribed by the Constitution be returned for reconsideration. It has properly been the practice of the President to inform Congress by message of his approval of bills, so that the fact may be recorded. But the essential thing to be done in order that a bill may become a law by the approval of the President is that it be signed within the prescribed time after being presented to him. That being done, and as soon as done, whether Congress is informed or not by the message from the President of the fact of his approval of it, the bill becomes a law, and is delivered to the Secretary of State as required by law. Much of the argument of counsel seems to rest upon the provision in relation to the final adjournment of Congress for the session whereby the President is prevented from returning, within the period prescribed by the Constitution, a bill that he disapproves and is unwilling to sign. But the Constitution places the approval and disapproval of bills, as to their becoming laws, upon a different basis. If the President does not approve a bill, he is required within a named time to send it back for consideration. But if by its action, after the presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill falls, and does not become a law. Whether the President can sign a bill after the final adjournment of Congress for the session is a question not arising in this case, and

action it should take, or, possibly, that it might enact a law containing the provision that it should not take effect until it had received an approving vote by the people. However, it is clear that Congress has no constitutional power to endow officials with compulsory powers for the holding of such a national referendum or to punish persons violating the administrative provisions prescribed for the taking of such a vote. Nor could State officials be called upon to operate the vote should any of the States refuse to give their assent thereto. The only possible ground upon which could be argued the constitutional power of Congress to give more than a voluntary or non-compulsory character to a national referendum, regarded from the viewpoint either of State officials who might be asked to operate it or of the private individuals concerned in it, would be that Congress has the right to obtain information which will assist it in the wise exercise of its legislative functions.

The question as to the constitutionality of legislation by referendum votes is elsewhere considered,²³ as is also the matter of the imposition upon, or the delegation to, State officials by Congress of duties in connection with the enforcement or administration of Federal acts or functions.²⁴

has not been considered or decided by us. We adjudge—and touching this branch of the case adjudge nothing more—that the act of 1892 having been presented to the President while Congress was sitting, and having been signed by him when Congress was in recess for a specified time, but within ten days, Sundays excepted, after it was so presented to him, was effectively approved, and immediately became a law, unless its provisions are repugnant to the Constitution.”

²³ See *ante*, § 124.

²⁴ See § 71.

CHAPTER XLI

THE FEDERAL POWERS OF TAXATION

§ 375. General Powers of Congress.

In the chapters which are immediately to follow will be taken up seriatim the legislative powers of Congress except in so far as these powers have been considered incidentally elsewhere in this treatise.

In addition to its legislative powers the Houses of Congress have certain other powers, judicial or executive in character. These non-legislative duties are discussed elsewhere in this treatise, and especially in the chapters dealing with the Separation of Powers.

In some cases the powers granted by the Constitution are also made obligations, and, in general, it may be said that where legislation is necessary to make effective the provisions of the Constitution there is laid upon Congress the constitutional obligation to enact this legislation. This obligation, however, is an "imperfect" one in that no legal means exist for compelling its performance or providing for what shall be done in the event of its non-performance. Thus the Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Should Congress fail by legislation to establish these inferior judicial tribunals and to clothe them with jurisdiction, there would be no constitutional means of compelling it to do so. Indeed, by failing as well to provide for the number and remuneration of Justices of the Supreme Court, Congress might render impossible the exercise of any Federal judicial power whatever. Once established the Supreme Court, by the immediate effect of constitutional provision, has the original jurisdiction provided for in Section II of Article I, but it is unable to exercise any appellate jurisdiction by way of appeals either from the State or lower Federal courts except as Congress has by statute provided.

This is but a single illustration of many that might be given of the manner in which the existence and administration of the Federal Government is absolutely dependent upon the action of Congress, for it may be laid down as a principle which admits of no exceptions that no legal means exist for compelling a legislative body to enact a given piece of legislation, or, indeed, to perform any of its functions.

Though, in many respects, not self-executory, and although the obligations created by its provisions are not enforceable by legal process, the Federal Constitution is, it is to be repeated, in all other respects a law and directly enforceable as such in the courts of the land. It is, as has been

already said, a law legislatively enacted by the State legislatures or the State conventions which, *quoad hoc* acting as a national law-making body, established it and ratified the amendments to it.

The present chapter will be limited to the discussion of the extent of the taxing power of the United States. The constitutional limitation imposed by the requirements of due process will receive general consideration, but will be considered in more detail in the chapters dealing specifically with that important constitutional limitation. The constitutional limitations, express and implied, upon the taxing powers of the States will be discussed in a later chapter especially devoted to that topic, and also in other chapters dealing with such subjects as Interstate and Foreign Commerce, Obligation of Contracts, Equal Protection of the Laws, and, of course, Due Process of Law.

§ 376. The Definition and Levying of Taxes.

Taxes have been defined by an eminent authority to be "burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."¹ The same author in another work observes that they "differ from forced contributions, loans, and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government."²

The power to tax is ordinarily spoken of as an incident of sovereignty, or, as a sovereign power. A more exact statement is, however, that inasmuch as the raising of a certain amount of revenue is essential to the existence and operation of a public governing body, that body has, even in default of express constitutional grant, an implied power to compel those subject to its authority to contribute the financial means necessary for its support.

The levying of a tax, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner, is a legislative function. In *Meriwether v. Garrett*³ the court said: "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by

¹ Cooley, *Constitutional Limitations*, 7th ed., p. 678.

² *Taxation*, Chap. I.

³ 102 U. S. 472.

which the tax shall be collected, and to designate the officers through whom its will shall be enforced.”

The determination of the precise amount of the tax which each individual or each piece of property shall pay according to the general rule legislatively laid down, is an administrative act. The determination whether the legislative rule is, constitutionally speaking, a proper one, and whether the administrative officials have properly followed it, as well as observed all the other requirements of law, is, of course, a judicial function. Thus the administrative official must in all cases, in his assessments both as to classes of persons and kinds of property, and as to rates of taxation, be guided by the law. Upon the other hand the legislature, when levying *ad valorem* taxes, has not the power itself, generally speaking, to declare the value of a specific piece, or of specific pieces of property for taxation purposes.⁴ Where, however, taxes are laid, not according to values of property, but upon persons, as a capitation tax, or upon occupations, as license fees and tolls, or upon documents, as stamp duties, or upon number or quantities of goods (“specific” taxes), the legislature fixes in each case the amount of the contribution.

The levying and collection of taxes amounts, of course, to the taking of private property for a public use, but the taxing power is distinct from that of eminent domain. When property is taken in exercise of the latter power the Fifth Amendment requires that the General Government shall make just compensation. When, however, property is taken under the taxing power the persons so taxed may be said to be compensated for their contributions by the general benefits which they receive from the existence and operation of the Government. But this is not to say that the burden of a tax that may be constitutionally laid upon an individual needs to be justified by a showing that he, individually, will receive benefit from the expenditure of the proceeds of the tax, and, much less, that the degree of that burden may be measured by the amount of benefit that the taxpayer may be expected to receive. This requirement and this mode of measurement applies only in the case of what are known as “Special Assessments” the constitutional limitations applying to which will be later considered in connection with the taxing powers of the States.⁵

In *Southern Pacific Ry. Co. v. Kentucky*⁶ we find the court saying: “The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burdens attainable, however desirable. The taxing power is one which may be interfered with upon grounds of

⁴ This question will be further considered in connection with the subject of special assessments.

⁵ See Chapter CII.

⁶ 222 U. S. 63.

injustice only when there has been such flagrant abuse as may be remedied by some affirmative principle of constitutional law," as, for example, the equal protection of the laws, due process of law, uniformity of application, and the like.

§ 377. The Extent of the Taxing Power.

The power to tax is, from its very nature, one of the most important powers possessed by the State. Aside from express constitutional limitations, the power places every person, every occupation, and all forms of property subject to such pecuniary burdens as the legislature may see fit to impose, the manner of apportioning and enforcing the collections of the contributions levied being within the discretion of the law-making body which imposes them.

A classic statement of the extent of the taxing power is that of Marshall in *McCulloch v. Maryland*.⁷ Marshall says: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard themselves against its abuse." "The power to tax," Marshall concludes, "involves the power to destroy."

In *Pacific Insurance Co. v. Soule* ⁸ the court said: "Congress may prescribe the basis, fix the rate, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government." Again, in *Veazie Bank v. Fenno*,⁹ the court said: "It is insisted . . . that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. . . . The first answer to this is that the judicial cannot prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legisla-

⁷ 4 Wh. 316.

⁸ 7 Wall. 433.

⁹ 8 Wall. 533.

ture is not to the courts, but to the people by whom its members are elected.”¹⁰

§ 378. Measurement of Taxes.

The courts have firmly fixed the proposition that, for the determination of the amounts of taxes to be assessed upon individual persons, corporations, or pieces of property, any reasonable standard of measurement may be selected, and that the intrinsic character of the tax is not determined by the mode of measurement thus selected. Thus, as will later be seen, the States may not, by an exercise of their powers of taxation, lay a direct burden upon interstate commerce, and yet they may measure the amount of the tax to be paid upon property by its market value, although that value is, to a large extent, due to its employment for the carrying on of interstate commerce. Again, the States and the Federal Government may measure the amount of inheritance or estate taxes to be paid by a decedent's estate by the value of the estate or of the part thereof received by the taxpayer, although the tax, in neither case, is construed to be a tax upon that estate or other property received by the taxpayer. In the one case, it is viewed as an exercise by the States of their right to regulate the succession to, or inheritance of, property; in the other case, it is viewed as an excise tax upon the right to take, or upon the act of taking, possession or ownership of property under the rights of succession or inheritance created by the States in which the property is located, or where the will was executed or probated or administrative proceedings had. And it has been held that taxes on corporate franchises may be measured by reference to the value of property that is not itself taxable.¹¹

§ 379. The Use of the Taxing Power for Other than Revenue Purposes.

The primary purpose of taxes is to obtain revenue for the State. Taxes may, however, be levied for regulatory purposes. When thus employed the constitutional right to levy them is derived from the constitutional authority of the legislature which authorizes the tax to regulate the matter in question. For example, Congress, as a means of regulating foreign and interstate commerce or the national currency, may impose taxes upon carriers or shippers, or upon issues of State banks designed to circulate as currency. With regard to this latter matter the court in *Veazie Bank v. Fenno*¹² said: “Having thus, in the exercise of undisputed constitutional

¹⁰ See to the same effect, *Austin v. Boston* (7 Wall. 694); *Spencer v. Merchant* (125 U. S. 355); *Knowlton v. Moore* (178 U. S. 41); *Treat v. White* (181 U. S. 264); *Patton v. Brady* (184 U. S. 608); *McCray v. United States* (195 U. S. 27).

¹¹ See *Plummer v. Coler* (178 U. S. 115), as to the measurement of estate taxes, and the discussion of cases in which the measurement of corporate franchise taxes is considered.

¹² 8 Wall. 533.

powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin in the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration."

In the so-called Head Money Cases—*Edye v. Robertson*¹³—was contested an act of Congress of 1882 which, for the regulation of immigration, imposed upon the owners of steam or sailing vessels bringing passengers from a foreign port into the United States, a tax of fifty cents for every such passenger. To this law it was objected that it was not levied to provide for the common defence and general welfare of the United States and that it was not uniform throughout the United States as required by the Constitution. After disposing of the question of uniformity, the court said: "But the true answer to all these questions is, that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce, of that branch of foreign commerce which is involved in immigration. The title of the Act, 'An Act to Regulate Immigration,' is well chosen. It describes as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources. It is true not much is said about protecting the ship owner. But he is the man who reaps the profit from the transaction, who has the means to protect himself and knows well how to do it, and whose obligations in the premises need the aid of the statute for their enforcement. The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of this statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make a profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed. If this is an expedient regulation of commerce by Congress, and the end to be attained

¹³ 112 U. S. 580.

is one falling within that power, the Act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."

The fact, called attention to by the court in this case, that the proceeds of the assessment upon the passengers were earmarked for the purpose of the statute and were not to go for the general support of the government may have had some interpretative force in determining the nature of the assessment, that is, whether or not, *in sensu strictiore*, the assessment was a tax, but the validity of the assessment was in no wise dependent upon this fact. In other words, there was no constitutional difficulty in sustaining, as a regulative measure, what was, in substance, a tax, even though its proceeds were to be covered into the Federal treasury and commingled with the general funds of the Government, and without any provision whatever being made as to the purpose for which these proceeds were to be spent.

In *Packet Co. v. Keokuk*,¹⁴ and *Packet Co. v. St. Louis*¹⁵ municipal ordinances imposing taxes for the use of wharves belonging to the cities, the amount of which was regulated by the tonnage of the vessels, were held not to be tonnage taxes within the meaning of the constitutional provision that "no State shall, without the consent of Congress, lay any duty of tonnage."

§ 380. Ulterior Purposes of Tax Laws.

In the cases which have been discussed in the immediately preceding sections the courts took the view that the laws whose constitutionality was questioned, though imposing what were in substance taxes, were not, constitutionally viewed, revenue measures, and, therefore, had not been passed by Congress in exercise of its taxing powers. Not being tax laws, it was held that they were not subject to the limitations, as regards uniformity, apportionment, etc., specifically laid by the Constitution upon the Federal taxing powers.

A constitutional proposition, different from this one, is presented when a legislative measure, passed in pursuance of a particular grant of power, has for its major and presumed intended effect, the regulation of a matter which the enacting legislature has no constitutional authority to regulate. The laws enacted by Congress present a considerable number of this character, most of which have been enacted in exercise of the taxing, postal and interstate and foreign commercial powers. Here, however, we shall deal only with the manner in which the courts have dealt with laws which have purported to have for their primary purpose the securing of revenue for the Federal Government.

¹⁴ 95 U. S. 80.

¹⁵ 100 U. S. 423.

§ 381. Primary Purpose of an Act, Constitutionally Considered.

When reference is made to the primary purpose of an act of Congress, attention is called to the purpose of the act constitutionally considered. This fixes the nature of the act—its essential character—although it may be that, looking to the motives of Congress leading to its enactment, and its probable effects when enforced, this primary purpose becomes relatively insignificant. In other words, the foreseen and intended incidental effects of an act may be socially, politically, or economically far more important than its primary effect, but this cannot transmute, constitutionally speaking, the incidental or secondary purpose of an act into its primary purpose, and thus, it may be, place the act beyond the legislative power of Congress.

In *Ex parte Kollock*,¹⁶ with reference to an oleomargarine law enacted by Congress, the court said: "The Act before us is, on its face, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And, considered as a revenue Act, the designation by the stamps, marks, and brands is merely in discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislature to confer."

The constitutionality of acts whose ulterior, and presumed intended, results would lie within fields beyond the constitutional regulatory power of Congress, came to their most acute issue in the important case of *McCray v. United States*,¹⁷ decided in 1904.

In this case was questioned the constitutionality of a law of Congress levying a tax of ten cents a pound upon oleomargarine, artificially colored to look like butter. The contention was that this rate was so high as to be surely prohibitive of the manufacture and sale of such oleomargarine, and that, therefore, it was to be presumed that the motive of those enacting the law was not that a revenue should be secured for the Federal Government, but that the manufacture should be prevented; and this, it was argued, rendered the law an unconstitutional effort upon the part of Congress to regulate the manufacture of a commodity within the States. The Supreme Court, however, held that the law, being upon its face a revenue measure, its ultimate effect or the motives of its enactors might not be judicially inquired into. The scope and effect of a law may be inquired into, the court said, to determine whether the act is, in general character, within the legislative power of Congress, but, that determined in the affirmative, the measure may not be invalidated because of consequences that may arise from its enforcement. "Undoubtedly," the opinion declared,

¹⁶ 165 U. S. 526.

¹⁷ 195 U. S. 27.

"in determining whether a particular act is within the granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. This being their necessary scope and operation, it follows that the acts are within the grant of power."

In *Knowlton v. Moore*¹⁸ it was argued that inheritance taxes levied by Congress were unconstitutional in that the effect of their extreme enforcement would or might be to destroy the right to succession to property on the occasion of death, a subject beyond the control of Congress. As to this the court said: "This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy, which may be the consequence of taxation, is a reason only that the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may, when further exercised, be destructive it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."¹⁹

The *McCray* case, it will thus be seen, was, in one respect, the opposite of *Veazie v. Fenno* and the *Head Money Cases*, in that it held the law in question to be a tax law and constitutional because it was such; whereas, in the earlier cases, the laws were justified as being, in real character, not revenue measures at all, and, therefore, not subject to the limitations constitutionally imposed upon Congress when enacting revenue laws.

§ 382. White Phosphorus Matches.

By an act of April 9, 1912,²⁰ Congress required all manufacturers of white phosphorus matches to register with the Internal Revenue Collector; declared that the matches should be packed in packages containing specified numbers of matches; and that upon all such matches a tax of two cents per hundred matches should be paid. Also, that, after January 1, 1913, such matches should no longer be imported, nor, after January 1, 1914, exported. Heavy fines were provided for violations or evasions of the act. It is a well-known fact that the substantial purpose of this law was to put an end to an

¹⁸ 178 U. S. 41.

¹⁹ For a criticism of *McCray v. United States*, see *Michigan Law Review*, VI, 277, article entitled "May Congress Levy Money Exactions, Designated 'Taxes,' Solely for the Purpose of Destruction?"

²⁰ 37 Stat. at L. 81.

industry that was highly deleterious to those working in it. It was, in short, a measure of hygiene, and had reference to an industry over which Congress had no direct legislative power. The tax levied was made high enough to secure the result desired, with the further result, as foreseen, that, no such matches being manufactured, the Government would receive no revenue therefrom. However, in substance, the law was a revenue measure, and as such within the taxing power of Congress, and, so far as the writer knows, its constitutionality has not been contested in the courts.

§ 383. Narcotic Drugs Act.

The act of December 17, 1914,²¹ with a view to discouraging the use of opium and coca leaves and their derivatives, confines their sale to registered dealers, who are required to record sales upon prescribed forms, which are to be preserved and open to official inspection, and permits the drugs to be prescribed or dispensed only by physicians who have registered and obtained a license so to do, and who must keep a record of the amounts prescribed or dispensed, together with the date and the name and address of the persons receiving the prescription or drug. These records, it is provided, shall be made readily accessible not only to agents of the United States Treasury Department, but also to State, Territorial and Insular Officials "charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs."

The only revenue feature of the act is the levying of a nominal tax of one dollar per annum upon each person "who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the said drugs."

In *United States v. Jin Fuey Moy*,²² the court was called upon to construe the act, but did not find it necessary to argue its constitutionality. In its opinion, however, the court found occasion to say: "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure, was right."

In *United States v. Doremus*,²³ the court considered the constitutionality of the act and upheld it as, in essence, a revenue measure. After referring to earlier decisions in point, the court said: "Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers and others who

²¹ 38 Stat. at L. 785. This law is known as the Harrison Narcotic Drug Act. Amended by the Revenue Act of 1918. 40 Stat. at L. 1057, 1130.

²² 241 U. S. 390.

²³ 249 U. S. 86. See also *Webb v. United States* (249 U. S. 96).

are named in Section 7 of the Act cannot be successfully disputed. The provisions of Section 2 . . . aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered by themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. . . . We cannot agree with the contention that the provisions of Section 2 controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress, acting under its constitutional authority, to impose excise taxes."

This case thus stated with especial definiteness the proposition that Congress, when exercising any legislative power, revenue or of other character, constitutionally vested in it, may incorporate in the law any regulatory or administrative provisions which can, by any reasonable consideration of their character or probable effect, tend to facilitate the realization of the primary and constitutional purpose of the act.

In *Linder v. United States*²⁴ it was held that a physician could not be prosecuted under the Harrison Narcotic Law for delivery to an addict, for self-administration, of tablets of morphine or cocaine for the relief of conditions incident to the patient's addiction. The act having been held to be purely of a revenue character, the court said that it could not constitutionally be construed to relate to other than revenue objects. The court, after referring to its statement in the *Jin Fuey Moy* case that the aim of the act could be secured only within the limits of a revenue measure, said: "The Narcotic Law is essentially a revenue measure, and its provisions must be reasonably applied with the primary view of enforcing the special tax. We find no facts alleged in the indictment (in the instant case) sufficient to show that petitioner had done anything falling within definite inhibitions or sufficient materially to imperil orderly collection of revenue from sales."

In *United States v. Dougherty*,²⁵ in which was involved an application of the Harrison Anti-Narcotic Act, the court interjected into its opinion an intimation that, in the light of decisions made since *United States v. Doremus*, the question as to the constitutionality of the act had become a matter of doubt. The court said: "The constitutionality of the Anti-Narcotic Act, touching which this court so sharply divided in *United States*

²⁴ 268 U. S. 5.

²⁵ 269 U. S. 360.

v. Doremus, 249 U. S. 86, was not raised below [in the instant case] and has not been again considered. The doctrine approved in *Hammer v. Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill v. Wallace*, 259 U. S. 44, and *Linder v. United States*, 268 U. S. 3, may necessitate a review of that question, if hereafter properly presented.”²⁶

Since that declaration the Narcotic Act has been before the Supreme Court, but not in such a manner as to compel that court to pass upon the act's constitutionality. In *Alston v. United States*,²⁷ a cause arising under the provisions of the act with regard to a stamp tax on certain drugs and declaring it unlawful to purchase or sell such drugs except in or from the original stamped packages, the court said: “These provisions are clearly within the power of Congress to lay taxes and have no necessary connection with any requirement of the act which may be subject to reasonable disputation. They do not absolutely prohibit buying or selling; have produced substantial revenue; contain nothing to indicate that by colorable use of taxation Congress is attempting to invade the reserved powers of the States. The impositions are not penalties.”

What would be the final opinion of the Supreme Court with reference to the other provisions of the Narcotic Act, or, at any rate, of some of them, when the question should again be properly and squarely brought before that tribunal, thus remained a matter of doubt which was not resolved until the case of *Nigro v. United States*.²⁸ In this case it was held, as a matter of statutory construction, that the words “any person” of section 2 of the act making it unlawful for any person to sell, barter, exchange, or give away any of the drugs covered by the act, with certain exceptions, were not, in their application, limited to those required to register and pay the tax specified in section 1 of the act, and, even as thus construed, the act was held constitutional. The operation of section 2 of the act in preventing individuals not registered dealers or physicians from acquiring the drugs or disposing of them, the court said, was directly related to the tax enforcement, constituting as it did a needed check on illegal sales. “It may be true,” said the court, “that the provisions of the Act forbidding all but registered dealers to obtain the order forms has the incidental effect of making it more difficult for the drug to reach those who have a normal and legitimate use for it, by requirement of purchase through order forms or by physician's prescription. But this effect, due to the machinery of the Act, should not render the order form provisions void as an infringement on State police power where these provisions are genuinely calculated to sustain the revenue features.”

²⁶ The cases here referred to are elsewhere discussed in this treatise.

²⁷ 274 U. S. 289.

²⁸ 275 U. S. 332.

§ 384. Federal Child Labor Laws.

In 1916 Congress enacted a law purporting to regulate the transportation in interstate commerce of commodities manufactured by establishments employing child labor. The law was held unconstitutional by the Supreme Court in *Hammer v. Dagenhart*,²⁹ upon the ground that, despite its declared character, it did not, in fact, provide for a regulation of interstate commerce, but for the control of manufacturing within the States, over which Congress had no constitutional power.³⁰ Congress thereupon sought to achieve substantially the same purpose as that sought in the earlier statute, namely, the discouragement or entire prevention of the employment of children of tender years in industries in the United States, by providing³¹ that a tax of ten per cent of the net profits of the year should be imposed upon persons or corporations who should knowingly employ, during any portion of the year, children within certain prescribed age limits.

In 1922 this law also was held unconstitutional in the case of *Bailey v. Drexel Furniture Co.*,³² the court taking the view that, as shown upon its face by various of its provisions, the law was not a revenue measure, upon which ground alone Congress could claim authority to enact it. In effect, the court held that the ten per cent levy provided for was in the nature of a penalty for the doing of acts which Congress had no constitutional power to prohibit, rather than a tax. In argument of this point, the court, with but one dissent,³³ and speaking through Chief Justice Taft, said: "We must construe the law and interpret the intent and meaning of Congress from the language of the Act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted, under previous decisions of this court, to infer solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years; and shall prevent children of less than sixteen years in mills and factories working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the

²⁹ 247 U. S. 251.

³⁰ For a discussion of this case, see *post*, § 590.

³¹ Title XII of the Revenue Act of February 24, 1919, 40 Stat. at L. 1057, at p. 1138.

³² 259 U. S. 20.

³³ That of Justice Clarke.

business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, only when he knowingly departs from the prescribed course that payment is to be exacted. Scinters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. . . . Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us."

Distinguishing the case from *Veazie Bank v. Fenno*,³⁴ and *McCray v. United States*,³⁵ the court pointed out that in neither of those cases did the law in question show upon its face its aim to regulate a matter wholly within State control, and the imposition of heavy penalties to enforce such regulation. So, also, in *United States v. Doremus*,³⁶ the regulations prescribed in the law which was questioned had a reasonable relation to the enforcement of the tax that was imposed.

To the inquiring mind the question arises whether the law with regard to the taxation of persons or corporations employing children, or of the products of such establishments, might not have been so framed as to bring it within the approval of the court as given in the earlier cases. This is by no means certain. A tax, levied specially upon such employers or the goods manufactured by them, would have to meet the test of reasonableness of classification for the purposes of taxation. As is elsewhere shown,³⁷ a legislature, in the exercise of its constitutional powers of taxation, is permitted a wide discretion as to what classes of persons or objects it will select for taxation, but when, within these classes, it attempts to select out particular individuals or commodities, or sub-classes thereof, to be taxed, leaving untaxed other individuals or commodities of the same general character, it

³⁴ 8 Wall. 533.

³⁵ 195 U. S. 27.

³⁶ 249 U. S. 86.

³⁷ See Chapter CV.

must be shown that there is something in the character of the selected individuals or commodities which furnishes a reasonable basis for distinguishing them from other individuals or commodities, and limiting to them the imposition of the tax. Otherwise, the tax is held to be invalid as a taking of property without due process of law. If, then, an act of Congress should attempt to tax those persons who employ children, leaving untaxed other persons engaged in exactly the same business, the courts might well find the classification an unreasonable and therefore unconstitutional one. Or, if the tax were attempted to be laid upon the commodities produced by child labor, or in establishments in which child labor is employed, the same point might be made by the courts which could call attention to the fact that the commodities thus taxed cannot be distinguished in character or quality from the commodities that are untaxed.

It may, however, be noted that the law which levies a tax upon matches containing white phosphorus, and which has not been questioned in the courts, selects out a special kind of matches for taxation.

§ 385. Cotton Futures Act.

In 1914, Congress imposed a tax of two cents a pound upon all cotton sold on "future" contracts.³⁸ This law was held unconstitutional in a lower Federal court ³⁹ because, though a revenue measure, it had originated in the Senate and not in the House of Representatives as required by Article I, Section 7, of the Constitution. The law was again enacted in 1916,⁴⁰ and, as thus reenacted, its constitutionality has not been assailed, although it is well known that the purpose of Congress has been, not so much revenue, as the discouragement, by such legislation, of "future" dealings in cotton.

§ 386. Tax on Opium.

In 1890 a Federal tax of ten dollars a pound was levied upon opium manufactured in the United States for smoking purposes.⁴¹ This tax has since been raised to three hundred dollars a pound.⁴² The act also provides elaborate requirements regarding registration of manufactures, and the sale and transportation of the drug. Here too, the purpose of Congress in levying the tax has been largely a police rather than a revenue one, but the validity of the act as a revenue measure has not been questioned by the courts.

§ 387. Grain Futures Trading Act.

By an act of August 24, 1921, Congress joined with a tax of twenty cents a bushel on all contracts for the sale of grain for future delivery, detailed

³⁸ 38 Stat. at L. 693.

³⁹ *Hubbard v. Lowe* (226 Fed. 135).

⁴⁰ 39 Stat. at L. 476.

⁴¹ 26 Stat. at L. 5670.

⁴² Act of January 17, 1914; 38 Stat. at L. 277.

regulations for the control of boards of trade. This act, in *Hill v. Wallace*⁴³ the Supreme Court held invalid, as being not a revenue act, but, as shown upon its face, a measure for the regulation of matters not within the constitutional legislative authority of Congress. The court said: "Our decision just announced in *Bailey v. Drexel Furniture Co.*⁴⁴ involving the constitutional validity of the Child Labor Tax Law, completely covers this case,"—in other words, that the Grain Trading Act by its regulations which were not such as ordinarily are attached to a revenue measure, showed that it could not be deemed, in its essential nature, a tax law. After summarizing these provisions of the act, the court said: "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision by the Secretary of Agriculture and the use of the administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed, the title of the Act recites that one of its purposes is the regulation of boards of trade. . . . The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which have no relevancy to the collection of the tax at all. . . . When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery for hearings by the Secretary of Agriculture and by the Commission of violations of these regulations, with the withdrawal by the Commission of the designation of the board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view."⁴⁵

§ 388. Protective Tariffs.

The constitutionality of a protective tariff, that is, of a system of duties levied on foreign imports so arranged as to furnish incidental protection to home industries, though questioned in earlier years, has passed beyond the range of controversy. Indeed, there never have been decisions of the courts in support of the invalidity of such legislation. If constitutional authority for a protective tariff is needed, it is furnished by the doctrine of *McCray v. United States*.⁴⁶ It is also to be observed that, in the case of protective tariff acts, Congress is able to rely not only on its taxing

⁴³ 259 U. S. 44. See also *Trusler v. Crooks* (269 U. S. 475).

⁴⁴ 259 U. S. 20.

⁴⁵ This Act is now superseded by that of Sept. 21, 1922 (42 Stat. at L. 998). See *post*, § 590 for a further discussion of the Act.

⁴⁶ 195 U. S. 27.

power, but upon its authority to regulate the foreign trade of the United States.⁴⁷

§ 389. Section 35 of the National Prohibition Act.

In *Lipke v. Lederer*,⁴⁸ it was held that Section 35 of the National Prohibition Act⁴⁹ though purporting to provide for a tax, in fact provided for a penalty, and, therefore, that Section 3224 of the Revised Statutes which prohibits injunctions to restrain the collection of internal revenue taxes did not apply. In this case the revenue officer, without notice, had undertaken to assess the penalty and had threatened to enforce its collection by seizure and sale of property without opportunity for a hearing of any kind. Injunction to prevent this summary administrative action was declared by the court to be appropriate.⁵⁰

§ 390. Taxation without Representation.

In *Heald v. District of Columbia*,⁵¹ it was urged by counsel that an act levying a tax upon the inhabitants of the District of Columbia was unconstitutional because these inhabitants have not the suffrage, and, politically, have no voice in the expenditure of the money raised by such taxation. As to this contention, the court said: "If sound, it would seem to apply, not only to taxes levied upon residents of the District for the support of the gov-

⁴⁷ In one of his letters to Joseph C. Cabell, Madison wrote: "It cannot be denied that a right to vindicate the commercial, manufacturing, and agricultural interests against unfriendly and reciprocal policies of other nations, belongs to every nation, that it has belonged at all times to the United States as a nation; that, previous to the present Federal Constitution, the right existed in the governments of the individual States, not in the Federal Government; that the want of such an authority in the Federal Government was deeply felt and deplored; that a supply of this want was generally and anxiously desired; and that the authority has, by the substituted Constitution of the Federal Government, been expressly or virtually taken from the individual States; so that if not transferred to the existing Federal Government, it is lost and annihilated for the United States as a Nation. Is not the presumption irresistible that it must have been the intention of those who framed and ratified the Constitution, to vest the authority in question in the substituted Government?" *Works of Madison* (ed. 1865), Vol. III.

For the views of Hamilton see Lodge's ed. of *Hamilton's Works*, Vol. I, 231, and Vol. III, 294 (Report on Manufactures).

See also on the general subject, Stanwood, *Tariff Controversies in the United States*, and the article by A. P. Winston, "The Tariff and the Constitution" in the *Journal of Political Economy*, Vol. V, 40.

For a recent emphatic statement of the constitutionality of protective tariffs, see *Hampton v. United States* (276 U. S. 394).

⁴⁸ 259 U. S. 557.

⁴⁹ 41 Stat. at L. 85.

⁵⁰ For reaffirmation of this case see *Regal Drug Co. v. Wardell* (260 U. S. 386).

⁵¹ 259 U. S. 114.

ernment of the District, but also to those taxes which are levied upon them for the support generally of the Government of the United States. It is sufficient to say that the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only on those who have political representation."

CHAPTER XLII

LIMITATIONS UPON THE FEDERAL TAXING POWER

The preceding chapter has dealt with the general nature of the power to tax. Incidentally this examination has led to a discussion of the power of the Federal Government through the exercise of its tax-imposing power to regulate, in effect, matters not otherwise within its constitutional control.

The present chapter will deal with the more specific constitutional provisions which determine the extent of, and limitations upon, the Federal Government in the matter of taxation.

§ 391. Constitutional Provisions.

Article I, Section 8, of the Constitution grants to Congress the general authority "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Section 9 of the same Article provides that "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." This provision is, in effect, qualified by the Sixteenth Amendment to the Constitution which declares that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the States, and without regard to any census or enumeration."

Section 9 of Article I also provides that "No tax or duty shall be laid on Articles exported from any State," and that "No preference shall be given by any regulation of commerce or revenue to the parts of one State over those of another: nor shall vessels bound to, or from, one State to another, be obliged to enter, clear, or pay duties in another."

Besides the limitations thus expressly declared, the taxing power of the Federal Government, as given in general terms in Section 8 of Article I, is without constitutional limitation, except as these may be implied from the general nature of the American Federal system, or from other provisions of the Constitution.

During the first years under the Constitution an effort was made by some to have the words of Section 8, Clause I of Article I, "to pay the debts and provide for the common defense and general welfare of the United States" construed as, in themselves, constituting a general grant to Congress to take such action as it might see fit to promote or achieve these purposes. It is, however, now generally agreed that these words do not con-

stitute a grant of power, but have for their intent the statement of the purposes for which the Federal Government may levy and collect taxes. More is elsewhere said regarding the force of these words in connection with the discussion of the appropriating or spending power of Congress.¹

The implied constitutional limitations upon the taxing power of the Federal Government will be dealt with later on, but it is appropriate to state here that Congress and the courts have decisively rejected the proposition that the Federal taxing power may be constitutionally used only for the purpose of carrying into effect the powers specifically granted to Congress by the Constitution.

§ 392. Tax, Duty, Impost, Excise, Defined.

The terms "Duty" and "Impost" have at times a meaning broad enough to make them practically synonymous with the general term "Tax," but, used in a more specific sense, they refer to customs or customs dues levied upon goods imported from foreign countries.

An excise is an internal tax levied upon the manufacture, sale, or use of a thing and is thus often termed a consumption tax. In the United States, an excise has come to mean practically all taxes other than customs dues or duties, and which are not direct taxes requiring to be apportioned among the States in proportion to the size of their respective populations. Thus, excise taxes are, in general, known as internal revenue duties, and, as a rule, their imposition is provided for in what are known as "Internal Revenue Acts", as distinguished from "Tariff Acts" which fix the customs duties to be imposed upon imports into the United States from foreign countries.²

§ 393. Express Limitations upon the Federal Taxing Power.

As has been seen, the limitations expressly laid by the Constitution upon the Federal taxing power are: (1) that duties, imposts, and excises shall be uniform throughout the United States; (2) that direct taxes, other than income taxes, shall be apportioned among the States according to the number of their several inhabitants; (3) that no tax or duty shall be laid upon articles exported from any State; (4) that preference shall not be given by any revenue regulation to the ports of one State over those of another State; and (5) that ships bound to, or from, one State, shall not be required to enter, clear or pay duties in another State. These express limitations will be considered *seriatim* and in the order stated.

§ 394. Uniformity in Taxation.

Granting the right of the legislature to classify persons and property for purposes of taxation, the requirements of due process of law and of the ad-

¹ See *ante*, § 62.

² For a discussion of the various definitions of excise, duty, and impost, see *Pacific Insurance Co. v. Soule* (7 Wall. 433).

ditional provision found in the Federal Constitution and in almost all if not in all of the State Constitutions that all laws shall be uniform, make it necessary that the assessment of all persons and property within the class or district selected for taxation shall be according to a uniform rule. In practice, however, this rule is subject to qualifications which are more appropriate for discussion in a treatise on taxation than in one on constitutional law. It will, therefore, not be further considered here. However, certain aspects of the subject will be later discussed in connection with the matter of special assessments.

§ 395. What Constitutes Uniformity throughout the United States.

In the *Head Money Cases*,³ speaking with reference to the requirement of the Federal Constitution that all duties, imposts, and excises shall be uniform throughout the United States, the court said: "The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. 'It shall be uniform throughout the United States.' Is the tax on tobacco void, because in many of the States no tobacco is raised, or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it? The tax is uniform when it operates with the same force and effect in every place where the subject is to be found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provisions of the Constitution, that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another,' because it does not apply to passengers arriving in this country by railroad or by other inland mode of conveyance. But the law applies to all ports alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States. It may be added that the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once.⁴ Here there is substantial uniformity within the meaning and purpose of the Constitution."

The principles of uniformity and of reasonable classification for purposes of taxation have been especially examined by the courts with reference to inheritance tax laws, and will later be treated under that head.⁵

³ 112 U. S. 580.

⁴ Citing *State Railroad Tax Cases* (92 U. S. 575).

⁵ See *post*, § 405.

In *Billings v. United States*⁶ it was held that the Uniformity Clause of the Constitution was not violated by an excise, based upon gross tonnage, levied upon the use of foreign-built pleasure yachts owned by the citizens of the United States, because a like tax was not imposed upon the use of domestic yachts under similar circumstances.

In *Flint v. Stone Tracy Co.*⁷ it was held that a Federal tax imposed upon the carrying on or doing business in a corporate or *quasi*-corporate capacity, and exempting therefrom businesses carried on by partnerships or private individuals, was not open to objection as lacking in constitutional uniformity. The advantages that inhere in the corporate form of doing business, it was held, furnished adequate ground for selecting out, as a class for taxation, the doing of business in such form. "The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things," said the court, "inhere in the advantages of business thus conducted, and do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals."

In *Florida v. Mellon*⁸ the claim that there was a lack of constitutional uniformity in the provision of the Revenue Act of 1926⁹ providing for a refund to payers of the Federal inheritance tax of amounts paid by them (up to eighty per cent of the Federal tax) under State inheritance tax laws, was dismissed with the statement that "the contention that the Federal tax is not uniform because other States impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several States nor control the diverse conditions to be found in the various States which necessarily work unlike results from the enforcement of the same tax. All that the Constitution requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States."

To the author's mind, this was an unduly summary treatment of the contention as to the lack of constitutional uniformity exhibited by the Federal tax in question. It is to be observed that the lack of uniformity in its effect, which was complained of, arose not out of the operation of the State inheritance laws which would be the case if the Federal law provided that the Federal tax should be assessed upon net estates or bequests after the payment of State inheritance taxes, but from the provision of the Federal law itself that, after the assessment of the Federal tax was had, there might be

⁶ 232 U. S. 261.

⁷ 220 U. S. 107.

⁸ 273 U. S. 12.

⁹ 44 Stat. at L. 9.

subtracted from the amounts shown to be payable thereunder the amounts paid under State inheritance tax laws up to eighty per cent of the Federal assessment. Thus the Federal law itself made provision for its unequal operation in the several States.¹⁰

§ 396. Must All Federal Laws Be Made Uniformly Applicable in All the States?

There is no question that Congress may enact laws the application of which is specifically limited to one or more of the areas under its exclusive legislative authority, that is, to the District of Columbia or to one or more of the Territories or Dependencies of the United States. With regard to laws which are to apply within the States it is specifically provided by the Constitution that "all duties, imposts and excises shall be uniform throughout the United States," and that laws establishing rules of naturalization and with regard to the subject of bankruptcies shall be similarly uniform. As to other laws enacted by Congress it would seem constitutionally possible to provide that their operation be limited to particular States, especially there appears to be reasonable objective reasons for such limitations.

§ 397. Direct Taxes.

The Constitution provides that capitation and other direct taxes levied by Congress shall be apportioned among the States in proportion to their respective populations. In a number of instances the constitutionality of Federal taxes not thus apportioned has been questioned upon the ground that they are, within the constitutional meaning of the word, direct taxes. The decision of the Supreme Court in each of these cases in which this point has been raised has supplied an authoritative determination only as to the direct or indirect character of the particular taxes in question. From these decisions, however, a judicial definition of direct taxes may be drawn which makes the term include all taxes levied upon property, real or personal, or upon the income derived from such property, and all capitation or poll taxes. A review of the cases will show that only within recent years has the court been willing to adopt this comprehensive definition, and, when it

¹⁰ It may also be observed with regard to the case of *Florida v. Mellon* that the court, in its opinion, went on to discuss this and other points although it held that, in fact, the complainant State had no sufficient interest in the suit to give it a *locus standi* in the court. The case is also of interest as involving the point, which was pressed upon the court but not discussed by it in its opinion, that, by the Federal provision in question, the United States was attempting, in an unconstitutional manner, to bring pressure upon the States which was so severe as to amount, in practical effect, to coercion, to adopt with reference to a matter which is exclusively one of domestic concern, a policy favored by the National Government.

For an especially acute criticism of the holding of the court in this case, see the article by Arthur W. Machen, Jr., "The Strange Case of *Florida v. Mellon*," in 13 *Cornell Law Quarterly*, 351.

finally did so, the decision came as a surprise to very many of the lawyers and courts of the country.

In 1798 in *Hylton v. United States*¹¹ it was held that a tax on carriages was not a direct tax. Chase in his opinion said: "The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax to be laid by that rule. . . . I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land."

Paterson in his opinion said: "Whether direct taxes, in the sense of the Constitution, comprehend any other tax, than a capitation tax and a tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears from the practice of some of the States to have been considered as a direct tax. Whether it be so, under the Constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal, I will not say the only objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land."

Iredell, in his opinion, said: "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution. That this tax cannot be apportioned is evident."

In *Pacific Insurance Co. v. Soule*¹² a tax on receipts of insurance companies was held to be not a direct tax, the *dicta* in *Hylton v. United States* being relied upon as authority.

In *Veazie Bank v. Fenno*¹³ a tax on the circulating notes of State banks was held to be an indirect tax.

In *Scholey v. Rew*¹⁴ a tax on succession to real estate was held indirect, the tax being declared to be one not on the land, but upon the right of succession. The court said: "Whether direct taxes, in the sense of the Con-

¹¹ 3 Dall. 171.

¹² 7 Wall. 433.

¹³ 8 Wall. 533.

¹⁴ 23 Wall. 331.

stitution, comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy.¹⁵

In *Springer v. United States*¹⁶ the income taxes provided for by the laws of 1862 were viewed as not direct taxes. After enumerating the various direct taxes previously levied, the court said: "It will thus be seen that whenever the government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate; and, 2, such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the National Treasury was the same. . . . This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight."

After reviewing earlier cases and citing the opinions of leading commentators, the opinion concluded: "Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."

§ 398. Income Tax Case—*Pollock v. Farmers' L. & T. Co.*

The foregoing line of cases, concluding with the emphatic assertion of a unanimous court in *Springer v. United States*, justly gave rise to the general opinion that the only taxes to be deemed direct taxes within the constitutional meaning of the term were capitation taxes and taxes on real estate. However, in the so-called Income Tax Case—*Pollock v. Farmers' Loan & Trust Co.*¹⁷—decided in 1895, this doctrine was overthrown, the court upon the first hearing holding that taxes on the rents or income of real estate are direct taxes; and, upon a rehearing, holding that taxes on personal property or on the income derived from personal property are equally direct.

Upon the first hearing the crucial point was, of course, whether a tax upon the income derived from real estate was distinguishable from a tax on the real estate itself. This being decided in the negative, it necessarily followed that, inasmuch as a tax on the real estate is admittedly a direct tax, a tax on the income derived therefrom would be direct. "The real question is," the majority justices declared, "is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and

¹⁵ Citing *Ins. Co. v. Soule* (7 Wall. 433); *Veazie Bank v. Fenno* (8 Wall. 533).

¹⁶ 102 U. S. 586.

¹⁷ 157 U. S. 429, and 158 U. S. 601.

the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.”¹⁸

A rehearing of the case having been allowed the court broadened still further the scope of the term “direct taxes,” making it include taxes on personal property and upon the income therefrom. To this doctrine four justices dissented.

In *Nicol v. Ames*¹⁹ the scope of the doctrine laid down in the *Income Tax* case was clearly stated. In this case it was argued that a duty levied by the War Revenue Act of 1898 upon sales or agreements of sale of products or merchandise at exchanges or boards of trade was a direct tax and as such

¹⁸ In a dissenting opinion, concurred in by Justice Harlan, Justice White, after a review of the earlier adjudications, said:

“The facts, then, are briefly these: At the very birth of the government a contention arose as to the meaning of the word ‘direct.’ That controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion, made use of language which clearly showed that he thought that the word ‘direct’ in the Constitution applied only to capitation taxes and taxes directly on land. Thereafter the construction thus given was accepted everywhere as definite. The matter came again and again to this court, and in every case the original ruling was adhered to. The suggestions made in the *Hylton* case were adopted here, and in the last case here decided, reviewing all the others, this court said that direct taxes within the meaning of the Constitution were only taxes on land and capitation taxes. And now, after a hundred years, after long continued action by other departments of the government, and after repeated adjudications of this court, this interpretation is overthrown, and the Congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government. By what process of reasoning is this to be done? By resort to theories, in order to construe the word ‘direct’ in its economic sense, instead of in accordance with its meaning in the Constitution, when the very result of the history which I have thus briefly recounted is to show that the economic construction of the word was repudiated by the framers themselves, and has been time and time again rejected by this court; by a resort to the language of the framers and a review of their opinions, although the facts plainly show that they themselves settled the question which the court now virtually unsettles. In view of all that has taken place and of the many decisions of this court, the matter at issue here ought to be regarded as closed forever. . . . It is said that a tax on the rentals is a tax on the land, as if the Act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes, to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to a direct levy on the land itself? It seems to me the question when thus accurately stated furnishes its own negative response.”

¹⁹ 173 U. S. 509.

unconstitutional because not properly apportioned. The court, however, held that the tax was in the nature of a duty or excise tax for the privilege of doing business at such places and not a tax on the products or merchandise sold, and, therefore, not a direct tax. The court said: "It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and, therefore, subject to the rule of apportionment. Various cases are cited, from *Brown v. Maryland* (12 Wheat. 419), down to those involving the validity of the income tax (*Pollock v. Trust Co.*, 157 U. S. 429) for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property, or on the sale thereof, then these cases do not apply."

In *Patton v. Brady* ²⁰ a tax upon tobacco, however prepared, manufactured, and sold, for consumption or sale, was held not a direct tax but an excise tax,—“not a tax upon property as such, but upon certain kinds of property, having reference to their origin and intended use.”

In *Spreckles Sugar Refining Co. v. McClain* ²¹ the special excise tax imposed on sugar refining by the act of 1898, and measured by the gross annual receipts in excess of a named sum, was held to be not a direct tax. “Clearly,” the court said: “the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts.”

§ 399. The Federal Corporation Tax of 1909.

Section 38 of the Tariff Law of 1909 contained the provision that every corporation “organized for profit and having a capital stock represented by shares . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources.”

In *Flint v. Stone Tracy Co.* ²² the constitutionality of this tax was attacked upon various grounds, and, among them, that it was an unapportioned direct tax. In that case the court held the tax to be an excise tax, and, therefore, being indirect in character, did not need to be apportioned. The tax, the court declared, was not upon the franchises of corporations irrespective of their use in business,—franchises granted to them by the States nor upon the property of corporations, but an excise upon the doing of corporate or insurance business with respect to the carrying on thereof. “It is a tax,” said the court, “upon the doing of business, with the ad-

²⁰ 184 U. S. 608.

²¹ 192 U. S. 397.

²² 220 U. S. 107.

vantages which inhere in the peculiarities of corporate or joint stock organization of the character described. As the latter organizations share many benefits of corporate organizations, it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies, the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any State or Territory." The income of the corporations taxed, the court declared, was used merely as a measure of the amount of tax to be paid.²¹

As thus interpreted the tax was declared to be indirect in character,—not upon property solely because of its ownership, and not payable unless there was a carrying on or doing of business in the designated capacity. "The difference between the acts," the court said, "is not merely nominal, but rests upon the substantial differences between the mere ownership of property and the actual doing of business in a certain way."

In *Zonne v. Minneapolis Syndicate* ²⁴ it was held that the tax was not properly leviable upon a corporation which, though organized for the owning and renting of an office building, had wholly parted with the control and management of the property, and by the terms of a reorganization had disqualified itself from any activity in respect to it, its sole authority in the premises being to hold the title to the property subject to a lease of one hundred and thirty years, and to receive and distribute the rentals which might accrue or the proceeds of a sale of the land, if it should be sold. This, it was held, was not the carrying on of a business in a corporate capacity such as would render the corporation subject to the tax.

In *McCoach v. Minehill & S. H. R. Co.*,²⁵ it was similarly held that a railroad company which, under legislative authority, had leased for an annual rental its entire road with all its rights, powers, privileges and franchises, except only its franchise to be a corporation, was not "engaged in business," and, therefore, was not subject to the Federal tax. "We cannot, however, agree with the contention made in behalf of the Government," said the court, "that because the Minehill Company retains its franchise of corporate existence, maintains its organization, and holds itself ready to exercise its franchises of eminent domain, or other reserve powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore doing business, in respect of the railroad, within the meaning of the corporation tax law." The mere receipt of the income from the property leased, the property being used in business by the lessee, and the receipt of interest and dividends from invested funds, and their distribution to its shareholders, the court added, was

²¹ This interpretation of the act the court said was sustained by the reasoning in *Spreckels Sugar Refining Co. v. McClain* (192 U. S. 397).

²⁴ 220 U. S. 187.

²⁵ 228 U. S. 295.

also not a doing of business, and amounted to nothing more than the receipt of ordinary fruits resulting from the ownership of property.²⁶

§ 400. Federal Inheritance Taxes Not Direct.

The constitutional definition of a direct tax was again raised in *Knowlton v. Moore*²⁷ with reference to the constitutionality of the inheritance taxes levied by the War Revenue Act of 1898. The court applied the well-established doctrine that the taxes in question were not upon the property inherited but upon the right to inherit, and, therefore, not being taxes upon property but upon a right, were in the nature of an excise tax, and as such indirect.²⁸

§ 401. Direct Taxes and the Sixteenth Amendment.

By the Sixteenth Amendment, adopted in 1913, it is declared that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

²⁶ Justices Day, Hughes and Lamar dissented.

²⁷ 178 U. S. 41.

²⁸ To the argument that the doctrine declared in *Scholey v. Rew* (23 Wall. 331), had been practically overruled by the Income Tax case, the court said:

"It is asserted that it was decided in the Income Tax Cases that in order to determine whether a tax be direct within the meaning of the Constitution, it must be ascertained whether the one upon whom by law the burden of paying it is first cast can thereafter shift it to another person. If he cannot, the tax would then be direct in the constitutional sense, and hence, however obvious in other respects it might be a duty, impost, or excise, it cannot be levied by the rule of uniformity, and must be apportioned. From this assumed premise it is argued that death duties cannot be shifted from the one on whom they are first cast by law, and therefore they are direct taxes requiring apportionment. The fallacy is in the premise. It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the Constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real, or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall. The proposition now relied upon was considered and refuted in *Nicol v. Ames* (173 U. S. 509)."

This addition to its power was given to Congress in order to meet the objection raised to Federal income taxes that, being direct in character, they might be constitutionally levied only when apportioned among the States.

In exercise of the power thus granted, Congress enacted the Income Tax Law of October 3, 1913,²⁹ and, since that time, this tax has become the most important of the sources of Federal revenue. Much litigation has resulted as to what may properly be assessed as "income," and the cases bearing upon this point will be discussed in the sections dealing with Federal Income Taxes.

The words of the Amendment making taxable incomes "from whatever source derived," has raised the question whether the Federal Government has been given the power to tax the salaries of State officials, of Federal judges, and income derived from bonds or other securities issued by the States. This question also will be discussed in the sections dealing with Federal Income Taxes.

In *Brushaber v. Union Pacific R. R. Co.*³⁰ the court disposed of the contention that had been made that, under the Sixteenth Amendment, Congress might levy income taxes that were neither apportioned nor uniform throughout the United States; that, in other words, income taxes remain direct taxes, and, therefore, are not subject to the requirement of uniformity which is imposed upon duties, imposts and excises, and also, as declared by the Amendment, do not need to be apportioned. This contention, the court said "is wholly without foundation" since the purpose of the Amendment is simply to avoid the rule applied in the *Pollock* case by which alone such taxes were removed from the great class of excises, duties and imposts subject to uniformity and placed under the class of direct taxes.

§ 402. Export Duties.

Among the express limitations upon the powers of Congress, enumerated by the Constitution is that which provides that "no tax or duty shall be laid on articles exported from any State."³¹ In another clause substantially the same prohibition is laid upon the States, it being declared that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports."³²

The term "exports" has been judicially limited to goods exported to for-

²⁹ 38 Stat. at L. 114.

³⁰ 240 U. S. 1.

³¹ Art. I, Sec. IX, Cl. 5.

³² "Except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress" (Art. I, Sec. X, Cl. 2).

foreign countries. In the earlier cases of *Brown v. Maryland*³³ and *Almy v. California*³⁴ it was taken for granted by the court that the term applied also to goods carried from one State to another State of the Union, but in *Woodruff v. Parham*³⁵ these *dicta* were overruled and the position taken which has not since been disturbed, that the prohibition has reference only to exportations to countries foreign to the United States. In this case, Justice Miller, after referring to the general power given to Congress to levy and collect taxes, duties, and imposts, said: "Is the word 'impost' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State to another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of section IX, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not at the same time exported from the former. But if we give to the word 'imposts' as used in the first-mentioned clause the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts. It is not too much to say that, so far as our research has extended, neither the word 'export,' 'import,' or 'impost' is to be found in the discussion on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. . . . Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit by this clause [that no State shall, without the consent of Congress, levy any impost or duty upon any export or import] the right of one State to tax articles brought into it from another."

In *Dooley v. United States*³⁶ one of the "Insular Cases," it was argued that the Foraker Act of April 12, 1900, was unconstitutional in so far as it provided for the payment of duties upon merchandise imported into Porto Rico from the United States. The court, however, held that Porto Rico, after cession to the United States, even though not "incorporated" into the United States was not foreign territory, and, therefore, that, under the definition laid down in *Woodruff v. Parham*, the tax in question was not a tax on goods exported from the United States. The court, moreover, went on to show from the circumstances of the case that the tax was to be con-

³³ 12 Wh. 419.

³⁴ 24 How. 169.

³⁵ 8 Wall. 123.

³⁶ 183 U. S. 151.

strued rather as one on goods imported into Porto Rico, than upon goods exported from the State of New York. The court in its opinion, however, was careful to add: "It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Article I, Section VIII, that 'all duties, imposts, and excises shall be uniform throughout the United States.'"³⁷ There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it."³⁸

To come within the definition of an export tax, it has been held that the tax must be one levied upon the right to export, or upon goods because of the fact that they are being exported or are intended to be exported. The fact that certain goods are intended for export does not, however, exempt them from an ordinary property tax, for, as said, the tax is one on exports only when its incidence or amount is determined by the fact that the goods are intended for export. This is the doctrine laid down in *Coe v. Errol*³⁹

³⁷ The author is not able to perceive this "great difficulty."

³⁸ In a dissenting opinion, concurred in by four justices, it was argued that, "The fact that the net proceeds of the duties are appropriated by the act for use in Porto Rico does not affect their character any more than if so appropriated by another and separate act. The taxation reaches the people of the States directly, and is national, and not local, even though the revenue derived therefrom is devoted to local purposes. . . . The prohibition that 'no tax or duty shall be laid on articles exported from any State' negatives the existence of any power in Congress to lay taxes or duties in any form on articles exported from a State, irrespective of their destination, and, this being so, the act in imposing the duties in question is invalid, whether Porto Rico after its passage was a foreign or reputed foreign territory, a domestic territory or a territory subject to be dealt with at the will of Congress regardless of constitutional limitations. . . . The prohibition on Congress is explicit, and noticeably different from the prohibition on the States. The State is forbidden to lay 'any imposts or duties;' Congress is forbidden to lay 'any tax or duty.' The State is forbidden from laying imposts or duties 'on imports or exports,' that is, articles coming into or going out of the United States. Congress is forbidden to tax articles exported from any State. . . . Congress may lay local taxes in the territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation, to exclude the products of Porto Rico; and this, notwithstanding it was held in *De Lima v. Bidwell* (182 U. S. 1), that Porto Rico after the ratification of the treaty with Spain ceased to be foreign and became domestic territory."

³⁹ 116 U. S. 517.

with reference to taxation by the States and in *Turpin v. Burgess*⁴⁰ with reference to Federal taxation.⁴¹

In *Pace v. Burgess*⁴² was questioned the validity of a Federal law requiring stamps to be affixed to packages of manufactured tobacco intended for exportation. The court, however, held the requirement to be a proper one to prevent fraud and not to amount to a tax on exports. "The stamp was intended," the court said: "for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and to secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed."

⁴⁰ 117 U. S. 504.

⁴¹ In the latter case the court said: "There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided in *Coe v. Errol* that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional provision against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, 'No tax or duty shall be laid on articles exported from any State.' Art. I, Sec. 9, par. 2. In the other they are: 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I, Sec. 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation, or intended exportation, or while they are being exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States, or of the States, know that goods apparently part of the general mass, and not in the course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds. It is true, as was conceded in *Coe v. Errol*, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress; so that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other."

⁴² 92 U. S. 372.

In *Fairbanks v. United States*,⁴³ however, a stamp tax imposed on foreign bills of lading by the act of 1898 was held to be, in substance and effect, a tax on the articles included in the bills of lading, and, therefore, a tax on exports, and as such unconstitutional. The law had provided for a stamp tax of one cent on ordinary bills of lading, and of ten cents on export bills of lading. To the contention that the tax was on the bills of lading and not one on the articles exported, the court said: "The fact that Congress has not graduated the stamp tax on bills of lading does not affect the question of power. . . . The question of the power is not to be determined by the amount of the burden attempted to be cast. . . . Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is *obsta principiis*, not *de minimis non curat lex*." ⁴⁴

In *Cornell v. Coyne* ⁴⁵ was sustained the imposition of the same manufacturing tax on an article manufactured for export, and in fact exported, as upon other similar articles not intended for export, the court saying that such a tax is not on the articles exported "but is only a tax or duty on the manufacturing of articles in order to prepare them for export." "The true construction of the constitutional provision," the opinion continued, "is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." ⁴⁶

In *Thompson v. United States* ⁴⁷ it was held that a tax on distilled spirits intended for exportation was not a tax on exports.

In *United States v. Hvoslef*,⁴⁸ it was held that a stamp tax upon charter parties exclusively for the carriage of goods from the United States to foreign States was a tax on the goods exported, and, therefore, unconstitutionally levied.⁴⁹

⁴³ 181 U. S. 283.

⁴⁴ Four justices dissented. They said: "Here, the small duty imposed, without reference to the kind, quality, or value of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment, or paper upon which the bill of lading was written or printed, it meant what is so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported." The dissenting justices also urged that the practice of the government for more than a century should be held controlling.

⁴⁵ 192 U. S. 418.

⁴⁶ Two justices dissented, holding that inasmuch as there was no appreciable interval of time between the commencement of manufacture and the preparation for exportation, it could not be reasonably said that the articles had become a part of the general mass of property in the locality of manufacture, and as such subject to a tax that could be distinguished from a tax upon the articles as subject of export.

⁴⁷ 142 U. S. 471.

⁴⁸ 237 U. S. 1.

⁴⁹ For a severe criticism of this case, see the article by C. H. Goodwin, "United States

In *Thames and Mersey Marine Insurance Co. v. United States*,⁵⁰ it was held that stamp taxes upon policies of marine insurance also were within the prohibition as to export taxes.

In *Peck & Co. v. Lowe*⁵¹ it was held that a general income tax levied upon the entire annual incomes of domestic corporations was not invalid as to income derived from export trade. The court, repeating what it had said in earlier cases, pointed out that the Sixteenth Amendment had no bearing upon the case, since it did not extend the Federal taxing power to new or excepted subjects, but merely removed the necessity for apportionment as regards income taxes. The tax in question, the court said, was not on articles in course of exportation, "or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. . . . It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. . . . At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins."

In *National Paper and Type Co. v. Bowers*⁵² it was held that an income tax on the profits derived by domestic corporations from the business of exporting goods from the United States was not a tax on exports from a State.⁵³

In *Spalding & Bros. v. Edwards*⁵⁴ it was held that the fact that a tax was levied by a general law touching all sales of a class and was not aimed directly at exports, did not exempt the tax from the constitutional prohibition as to export taxes, and that, in the instant case, the tax could not constitutionally be levied upon the sales of goods by a manufacturer to a commis-

v. Hvorslef; a Constitutional Source of National Revenue Impaired" in the *Harvard Law Review*, Vol. XXIX, p. 469.

⁵⁰ 237 U. S. 19.

⁵¹ 247 U. S. 165.

⁵² 266 U. S. 373.

⁵³ Upon authority of *Peck v. Lowe* (247 U. S. 165). The fact that foreign corporations engaged in similar business were not subject to the tax was held immaterial. The court said: "There may be benefit in the inviting of foreign corporations into the United States—benefit in their investments and activities; and, as counsel for the government points out, the domestic corporation gets the power of the United States to protect its interests and redress its wrongs in whatever part of the world its business may take it. . . . The government, therefore, contends, and rightly contends, that domestic corporations are required to pay a tax on their incomes from all sources, while foreign corporations are taxed only on their incomes from sources within the United States, because, to repeat, only that income is earned under the protection of American laws." See also *Barclay v. Edwards* (267 U. S. 442).

⁵⁴ 262 U. S. 66.

sion merchant for export, and where title passed upon the delivery of the goods by the manufacturer to the carrier. In this case, said the court, the export had begun, and the constitutional prohibition therefore applied.

§ 403. Preferences to Ports and Ship Dues.

The prohibition laid upon Congress as to the giving of preferences by regulations of commerce or of revenue, to the ports of one State over those of another State has given rise to few occasions for judicial action, and, in those cases, the question has arisen with reference to regulations of commerce rather than to the imposition of taxes. As regards taxation, this limitation has received no exposition at the hands of the courts. And the same is true as to the constitutional provision that vessels bound to, or from, one State, may not be compelled to enter, clear, or pay duties in the ports of another State.⁵⁵

The connection between the clause prohibiting Congress to give preference to the ports of one State over those of another State, and the clause requiring that duties, imposts and excises shall be uniform throughout the United States is very close, and, indeed, in the Constitutional Convention, the two clauses were reported together. Chief Justice White, in his opinion in *Knowlton v. Moore*,⁵⁶ referring to this, said: "Thus it came to pass that, although the provisions as to preference between the ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. . . . The preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."

In *Pennsylvania v. Wheeling and Belmont Bridge Co.*⁵⁷ which is perhaps the chief case construing the preference clause, the court said: "It is a mistake to assume that Congress is forbidden to give a preference to a port in one State over a port in another. Such preference is given in every instance where it makes a port in one State a port of entry, and refuses to make another port in another State a port of entry. No greater preference, in one sense, can be more directly given than in this way, and yet the power of Congress to give such preference has never been questioned. . . . The truth seems to be that what is forbidden is not discrimination between individual ports within the same or different States, but discrimination between States; and if so, in order to bring this case within the prohibition, it is necessary to show not merely discrimination between Pittsburgh and

⁵⁵ Congress may permit the States to adopt reasonable and non-discriminatory pilotage regulations. *Thompson v. Darden* (198 U. S. 315).

⁵⁶ 178 U. S. 41.

⁵⁷ 18 How. 421.

Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania.”⁵⁸ And, at another place, in the same opinion the court said: “There are many acts of Congress passed in the exercise of this power to regulate commerce, providing for a special advantage to the port or ports of one State and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce may be referred to as examples. It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise.”

In *South Carolina v. Georgia*⁵⁹ it was held that the closing of a channel on the South Carolina side of a boundary river between that State and Georgia was not a prohibited preference to the ports of the latter State. The court, referring to the *Belmont Bridge* case said: “It was then said that prohibition of such a preference does not extend to acts which may directly benefit the ports of one State and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors erection of lighthouses, and other facilities of commerce.”⁶⁰

§ 404. Implied Limitations Upon the Federal Taxing Power.

The implied limitations upon the Federal taxing power are those which arise from the requirements of due process of law and from the essential nature of the American constitutional system which restrains the United States from directly interfering with the exercise by the States of their constitutional powers.

The relation of due process of law to the taxing power, whether of the general Government or of the States, is considered in the chapters dealing with Due Process of Law.⁶¹

The restraint upon the Federal taxing power arising from the essential nature of the American constitutional system have already been dealt with in Chapter V.

⁵⁸ In this case it was held that a law authorizing a bridge over the Ohio River at Wheeling and forbidding interference with it by crews of vessels navigating the river, was a legitimate exercise by Congress of its power to regulate commerce.

⁵⁹ 93 U. S. 4.

⁶⁰ See also *Louisville and Nashville R. Co. v. Interstate Commerce Commission* (184 Fed. 118); and *Armour Packing Co. v. United States* (209 U. S. 56).

⁶¹ See Chapter CII.

§ 405. Federal Inheritance or Estate Taxes.

Since early years inheritance or "estate" taxes have been employed by the Federal Government as a source of revenue, and they have now become, it would seem, a permanent feature of the "internal revenues" of the United States. By the Stamp Act of July 6, 1797, a duty was levied on receipts for legacies and shares of personal estate. So also a legacy tax on the devolution of personal property and stamp taxes on probates of wills and letters of administration were imposed by the War Revenue Acts of July 1, 1862, and June 30, 1864, the latter act providing for a succession tax on real estate. In the income tax provisions of the act of August 27, 1894, incomes were defined to include "money and the value of all personal property acquired by gift or inheritance." Again, in the War Revenue Act of June, 1898, taxes were imposed upon legacies and distributive shares of personal property.

The Revenue Act of 1921 which, as Title IV, includes the "Estate Tax," provides (Section 401) "That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States."

By Section 403 it is provided that, in the case of non-residents, the net estate shall be obtained by making the deductions provided for by the act from "that part of his gross estate which at the time of his death is situated in the United States."

Section 402 provides as to a resident of the United States that the value of the gross estate (from which by making the provided deductions the value of the net estate is to be determined) shall "be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."

The tax is levied upon the succession or transfer of estates of decedents whether residents or non-residents of the United States. In the case of non-residents the property transferred must, of course, be situated within the United States.⁶²

It will be noted that this tax is, as stated in the act, not upon the property of the estate, but "upon the transfer of the net estate," and is paid by the executor or administrator before the estate is distributed. In other words, the amount paid, in effect, by each legatee is determined not by the amount of his bequest or inheritance but by the total value of the estate.

In the Revenue Act of 1898⁶³ the inheritance tax was designated, not as

⁶² For the purposes of the acts, the term United States includes the District of Columbia, and the Territories of Alaska and Hawaii, but not the other dependencies of the United States such as Porto Rico and the Philippines.

⁶³ 30 Stat. at L. 464.

an estate tax, but as one upon legacies and distributive shares of personal property, and was measured as to each legatee by the amount to be received from the estate of the decedent, and by the degree of his relationship to the decedent.

The constitutionality of the inheritance tax provisions of this last law of 1898 was upheld in *Knowlton v. Moore*.⁶⁴ In this case it was argued that the tax was void, first, because it was a direct tax and not apportioned among the States according to their respective populations; second, because it was not, in its operation, "uniform throughout the United States"; and third, that, regarded as a succession tax, it attempted the Federal regulation of a matter placed within the exclusive control of the States.

The reasoning of the court upon the first of these points is considered in another section of this chapter.⁶⁵ As to the question of uniformity the contention was that the requirement was violated because the statute exempted legacies and distributive shares in personal property below \$10,000, because it classified the rate of tax according to the relationship of the inheritor or devisee to the deceased, and because it provided for a rate progressing according to the amount of the legacy or share. To this contention the court replied: "Considering the text, it is apparent that if the word 'uniform' means 'equal and uniform' in the sense now asserted by the opponents of the tax, the words 'throughout the United States,' are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution. Taking a wider view, it is to be remembered that the power to tax contained in Section 8 of Article I is to lay and collect 'taxes, duties, imposts, and excises; . . . but all duties, imposts and excises shall be uniform throughout the United States.'" Thus, the qualification of uniformity is imposed, not upon the taxes which the Constitution authorizes, but only on duties, imposts, and excises. The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts, and excises, and it is not applicable to any other form of taxes. It cannot be doubted that in levying direct taxes, after apportioning the amount among the several States, as provided in Clause 4 of Section 9 of Article I of the Constitution, Congress has the power to choose the objects of direct taxation, and to levy the quota as apportioned directly upon the objects so selected. Even then, if the view of inherent uniformity be the true one, none of the taxes so levied would be subjected to such rule, as the requirements only relate to duties, imposts, and excises. But the classes of taxes termed duties, imposts and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the

⁶⁴ 178 U. S. 41.

⁶⁵ Section 400.

sense claimed is, in the nature of things, the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord, which the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties, and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the Constitution in all countries in the levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress. Now, that the requirement that direct taxes should be apportioned among the several States contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear. Giving to the term uniformity as applied to duties, imposts, and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts, or excises upon a particular subject in one State and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. . . . It is yet further asserted that the tax does not fulfil the requirements of geographical uniformity, for the following reasons: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the

Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States. Indeed, the contention was substantially disposed of in License Tax cases.⁶⁶

As to the contention that, viewing the tax as one on succession, the law was in regulation of a matter within the exclusive control of the States, the court, after reaffirming the principle that the tax is one on the right of succession, said: "Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritance or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of state legislation. . . . The fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States, on the one hand, or the several States, on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. . . . It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. . . . Under our constitutional system both the national and state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

⁶⁶ 5 Wall. 462.

In *Snyder v. Bettman*⁶⁷ the court said that the case of *Knowlton v. Moore* "must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that under our Constitution the devolution of property is determined by the laws of the several States."

§ 406. Federal Inheritance Taxation of State Agencies, Property or Securities.

In *Snyder v. Bettman* it was held that a succession tax, such as that levied by the act of 1918, could be levied upon bequests to a municipality of a State for public purposes, since the tax, being collected from the property while in the hands of the executor, could not be regarded as a tax upon the municipality, although it might operate incidentally to reduce, by the amount of the tax, the amount of the bequest. The court said: "Conceding fully that Congress has no power to impose a burden upon a State or its municipal corporations, the question in each case is whether the tax is direct or incidental, since we have had frequent occasion to hold that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property. Thus in *Van Allen v. The Assessors*⁶⁸ we held it to be within the power of the States to tax the shares of national banks, though a part or the whole of the capital of such bank were invested in the national securities exempt from taxation, upon the ground that the taxation of the shares was not a taxation of the capital. So a tax upon deposits was upheld, though such deposits were invested in United States securities.⁶⁹ The same principle was extended to a statute of New York, imposing a tax upon corporations measured by its dividends, though such dividends were derived from interest upon government bonds."⁷⁰

⁶⁷ 190 U. S. 243.

⁶⁸ 3 Wall. 573.

⁶⁹ *Society for Savings v. Coite* (6 Wall. 594); *Provident Inst. for Savings v. Massachusetts* (6 Wall. 611); *Hamilton Mfg. Co. v. Massachusetts* (6 Wall. 632).

⁷⁰ *Home Ins. Co. v. New York* (134 U. S. 594). In a dissenting opinion by Justice White, concurred in by Chief Justice Fuller and Justice Peckham, it was argued that the court in its majority opinion had improperly compared the power of the United States to tax, which does not extend to the taxation of the States or their instrumentalities, with the power of the States to regulate the succession of property. Justice White said: "The power of the State of New York which was upheld in both the *Perkins* and *Coler* cases (*United States v. Perkins*, 163 U. S. 625; *Plumber v. Coler*, 178 U. S. 115),

In another chapter⁷¹ it is pointed out that a State tax on legacies consisting of United States bonds is not unconstitutional.⁷²

§ 407. Federal Inheritance Tax on Tax Exempt Securities.

In *Murdock v. Ward*⁷³ it was held that a Federal inheritance tax may be imposed on legacies or shares consisting of United States bonds, even when these bonds have been issued under a law expressly exempting them from taxation in any form, State or Federal, direct or indirect.⁷⁴

§ 408. Succession, Estate, or Legacy Taxes Are Indirect Taxes.

In *Greiner v. Lewellyn*⁷⁵ the court said: "That the Federal Government has power to tax the transmission of legacies was settled by *Knowlton v. Moore* (178 U. S. 41); and that it has the power to tax the transfer of the net assets of a decedent's estate was settled by *New York Trust Co. v. Eisner* (256 U. S. 345). The latter case has established also that the estate

rested not simply on the authority of that State to impose an inheritance tax, but its admitted right to regulate the transmission or receipt of property by death. On the other hand, the right of the United States to levy an inheritance tax, which was upheld in *Knowlton v. Moore* (178 U. S. 41), was based solely upon the power of the United States to tax, and that case, therefore, conveys no intimation that there is authority in the United States to levy an inheritance tax upon an object which it has no power under the Constitution to tax at all, either directly or indirectly. The distinction between the two, that is, between the broader power of a State, resulting from its authority not only to tax but also to regulate the transmission or receipt of property by death, and the narrower power, that is, of taxation alone, vested in the government of the United States was explicitly pointed out in *Knowlton v. Moore*. . . . The United States not possessing, as the States do, the right to regulate successions, when the United States calls into play the taxing power over the subject of the passage or receipt of property by death, the extent of its authority is to be measured solely by the scope of the taxing power conferred by the Constitution. When, on the contrary, the State imposes a burden upon the passage or receipt of property by death, its right to do so, if not sustainable by the exercise of the taxing power, finds adequate support in the authority vested in it to regulate the transmission or receipt of property on the occasion of death. This was clearly pointed out in *United States v. Perkins* (163 U. S. 630)."

⁷¹ See § 93.

⁷² *Plumber v. Coler* (178 U. S. 115).

⁷³ 178 U. S. 139.

⁷⁴ The court said: "Whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power shall not be exercised, we need not consider, because the contract in this case does not, as we view it, mean that a State may not, or the United States may not, tax inheritances and legacies, regardless of the character of the property of which they are composed. That some of the holders of United States bonds may not have paid franchise taxes to the States, and others may have paid State or Federal inheritance and legacy taxes, has nothing to do with the contract between the United States and the bondholders. The United States will have complied with their contract when they pay to the original holders of their bonds, or to their assigns, the interest, when due, in full, and the principal, when due, in full."

⁷⁵ 258 U. S. 384.

tax imposed by the Act of 1916, like the earlier legacy or succession tax, is a duty or excise, and not a direct tax, like that on income from municipal bonds."

In *New York Trust Co. v. Eisner*⁷⁶ it was again declared that the estate tax levied by the law of 1916 was an excise tax and, therefore, did not need to be apportioned among the States. As to the claim that the tax was an interference with the right of the States to regulate the descent and distribution of property, the court said that the unsoundness of this contention had been settled by *Knowlton v. Moore*.⁷⁷ That case, it is true, dealt with a legacy, rather than an estate tax, but the principle was the same. The court said: "It is admitted, as since *Knowlton v. Moore*, it has to be, that the United States has power to tax legacies, but it is said that this tax is cast upon a transfer while it is being effectuated by the State itself and therefore is an intrusion upon its processes, whereas a legacy tax is not imposed until the process is complete. An analogy is sought in the difference between the attempt of a State to tax commerce among the States and its right after the goods have become mingled with the general stock in the State. A consideration of the parallel is enough to detect the fallacy. A tax that was directed solely against goods imported into the State and that was determined by the fact of importation would be no better after the goods were at rest in the State than before. It would be as much an interference with commerce in one case as in the other. *I. M. Darnell & Son Co. v. Memphis*, 208 U. S. 113; *Welton v. Missouri*, 91 U. S. 275. Conversely if a tax on the property distributed by the laws of a State, determined by the fact that distribution has been accomplished, is valid, a tax determined by the fact that distribution is about to begin is no greater interference and is equally good."

§ 409. Federal Income Tax.

The Federal Income Tax Laws have already been dealt with in the sections dealing with constitutional definition of direct taxes, and it but remains to consider certain other constitutional questions which have arisen regarding them, and especially with reference to additional power given to Congress by the Sixteenth Amendment.

In *Brushaber v. Union Pacific R. R. Co.*⁷⁸ the income tax provided by the Tariff Act of 1913 was upheld against the charge of lack of uniformity in that it exempted certain classes of associations or corporations such as labor, agricultural and horticultural organizations, mutual savings banks, etc., and that it was progressive in character; that it did not meet the requirements of due process of law as regarded its mode of collection at the source and the deductions permitted; and that unwarrantable powers had been delegated to the Secretary of the Treasury.

⁷⁶ 256 U. S. 345.

⁷⁷ 178 U. S. 41.

⁷⁸ 240 U. S. 1.

Most of these objections, the court declared, arose from a false idea as to the purpose and effect of the Sixteenth Amendment. That Amendment, the court said, did not confer a power to levy income taxes in a generic sense—that authority the United States had possessed prior to its adoption. Nor was it the purpose of the Amendment to distinguish between different kinds of income taxes. Its “whole purpose” was “to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the *Pollock* case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock* case was decided; that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived.”

This interpretation of the Amendment, together with the doctrines of *Flint v. Stone Tracy Co.*,⁷⁹ the court declared, was sufficient to dispose of the objection raised to the power of Congress to exempt from the tax certain classes of corporations or organizations. As to the other constitutional objections to the tax, the court said: “So far as these numerous and minute, not to say in many respects hypercritical, contentions are based upon an assumed violation of the uniformity clause, their want of legal merit is at once apparent, since it is settled that that clause exacts only a geographical uniformity, and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of. . . . So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause.”⁸⁰

It would seem that this last statement of the court is too broadly expressed if it be taken to mean that in the levying, assessing, and collecting of taxes by the Federal Government no questions of due process of law can arise. This is by no means the case as elsewhere appears in this treatise.⁸¹ What the court undoubtedly intended to say was that the extent or general scope of the Federal taxing power, that is, as to the kinds of taxes that may

⁷⁹ 220 U. S. 108.

⁸⁰ Citing *Treat v. White* (181 U. S. 264); *Patton v. Brady* (184 U. S. 608); *McCray v. United States* (195 U. S. 61); *Flint v. Stone Tracy Co.* (220 U. S. 107); *Billings v. United States* (232 U. S. 261).

⁸¹ See Chapter CII.

be levied, is not limited by the Fifth Amendment. Indeed, in the same paragraph, the court went on to concede that a seeming tax might be so arbitrary as to constrain to the conclusion that it was not a tax at all but a taking of property in violation of the Fifth Amendment—a proposition which, however, was not present in any of the objections which had been raised to the tax imposed by the law of 1913.

In refutation of the allegation that the act provided for an unconstitutional delegation of authority to the Secretary of the Treasury, the court contended itself with referring to the cases of *Field v. Clark*,⁸² *Buttfield v. Stranahan*,⁸³ and *Oceanic Steam Navigation Co. v. Stranahan*.⁸⁴

§ 410. Stock Dividends Not Income.

In *Eisner v. McComber*,⁸⁵ the purpose and effect of the Sixteenth Amendment were again examined by the court in connection with the contention made that, under the Amendment, Congress did not have the power, under an unapportioned income tax law, to treat as income of the stockholder, stock dividends lawfully made and in good faith against accumulated profits. This contention the court upheld. It is not necessary here to enter upon a discussion of the reasoning whereby the court distinguished between capital and income and between the interests of shareholders as individuals and those of the corporations whose shares they hold, as no strictly constitutional principles were therein involved. Of constitutional importance is only the declaration of the court as to the strictness with which the Sixteenth Amendment should be construed. The court said: "A proper regard for its genesis, as well as its very clear language, requires . . . that this Amendment should not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal." Stock dividends, the majority of the court held, not being properly "income," could not be taxed under the Amendment without apportionment.⁸⁶

In *Miles v. Safe Deposit and Trust Co.*⁸⁷ it was held that "rights" accruing to stockholders to subscribe for new stock in the corporation at a price less than its intrinsic value, were analogous to stock dividends, and, therefore, could not be assessed as income. The court, however, pointed out that the proceeds from the sale of such "rights" were properly to be deemed income, just as, in *Eisner v. Macomber*⁸⁸ it had been declared that gains through the sale of stock obtained as dividends were to be treated as income.

⁸² 143 U. S. 649.

⁸³ 192 U. S. 470.

⁸⁴ 214 U. S. 320.

⁸⁵ 252 U. S. 189.

⁸⁶ Four justices dissented.

⁸⁷ 259 U. S. 247.

⁸⁸ 252 U. S. 189.

§ 411. Salaries of Federal Judges.

In *Evans v. Gore*⁸⁹ the court held that, despite the broad language of the Amendment as to incomes from whatever source derived, the salaries of Federal judges might not be taxed, since Article III, Section 1, provides that the compensation of such judges shall not be diminished during their continuance in office.

Here again the court held the Amendment strictly to the avoiding of the rule laid down in *Pollock v. Farmers' Loan & Trust Co.*⁹⁰ and, therefore, refused to give it an application that would, in effect, nullify a specific prohibition contained elsewhere in the Constitution.⁹¹

In *Miles v. Graham*⁹² the court held that even as to judges appointed after the Revenue Act of 1918 took effect, an income tax could not be levied.

§ 412. Extraterritorial Aspects of the Taxing Power of the United States.⁹³

In *Michigan Central R. R. Co. v. Slack*,⁹⁴ the Supreme Court, interpreting and applying a provision of the Federal Internal Revenue Law as amended by the law of 1886, upheld as an excise tax a percentum tax on interest due by an American corporation, doing business in America, on its bonds issued before the revenue law was enacted and held at the time by non-resident foreigners. The law in question levied a general tax on corporations, such as was the plaintiff company, to be paid by them out of their earnings, income and profits, and provided that the amounts payable should be deducted by the companies from their dividends, interest or funded debt, etc., and paid over to the revenue agents of the American Government.

In the course of its opinion the court said: "Whether Congress, having the power to enforce the law, has the authority to levy such a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the Government no allegiance, is a question which we do not think necessary to the decision of this case. The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute." In other words, the tax was not, in truth, upon the non-resident holders of the bonds, although it was deducted

⁸⁹ 253 U. S. 242.

⁹⁰ 158 U. S. 601.

⁹¹ The court pointed out that this construction of the Amendment, first stated in *Brushaber v. Union Pacific R. R. Co.* (240 U. S. 1), had been reaffirmed in *Stanton v. Baltic Mining Co.* (240 U. S. 103); *Peck v. Lowe* (247 U. S. 165); and *Eisner v. McComber* (252 U. S. 189). Justices Holmes and Brandeis dissented.

⁹² 268 U. S. 501.

⁹³ The pages dealing with the subject have been excerpted from the author's *Fundamental Concepts of Public Law*. The Macmillan Co., 1924. Reprinted by permission.

⁹⁴ 100 U. S. (10 Otto) 595.

from and paid out of the interest due them as such holders, but upon the corporations which paid the interest. However, the court went on to say: "It is true that the Act went further, and declared that, except when the company had contracted otherwise, it might deduct this tax from the amount due the bondholders. And where the bondholder was subject to congressional legislation by reason of citizenship, residence or situs of the property taxed, it was within the lawful power of Congress to do so. Whether, as a question of international law, this declaration would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss; for this court, on all such subjects is bound by the legislative and political departments of its own Government."

In *United States v. Erie R. R. Co.*⁹⁵ decided in 1882, which was an action to recover taxes paid under protest, levied under the same revenue provision as that involved in the case just considered, Chief Justice Waite declared that the authority of that case should govern. Justices Bradley and Harlan concurred in the judgment rendered, but not for the reasons stated in the earlier case. Justice Bradley, speaking for Justice Harlan as well as himself, said that he had always been of the opinion that the tax in question was on the incomes *pro tanto* of the holders of the bonds or stocks of the companies concerned. "The objection," he said, "that Congress had no power to tax non-resident aliens, is met by the fact that the tax was not assessed against them personally, but against the *rem*, the credit, the debt due to them. Congress has the right to tax all property within the jurisdiction of the United States with certain exceptions not necessary to be noted. The money due to non-resident bondholders in this case was in the United States,—in the hands of the company—before it could be transmitted to London, or other place where the bondholders resided. While here it was liable to taxation."

Continuing, Justice Bradley went on to define the general jurisdictional powers of a government in the following significant, even if *obiter*, words: "Whether taxation thus imposed would be respected by foreign Governments if the creditor could bring before their courts the debtor company or its property, does not concern us in considering the question now presented. There is nothing in the Constitution [nor, he might have added, in the nature of any sovereign State] which authorizes this court, or any other court, to disaffirm the power of Congress to lay the tax. Congress is its own judge of the propriety or expediency of laying it. Indeed, in so far as the power of Congress is concerned, regarded in reference to any power the courts have to limit or restrain it, I see no reason why Congress may not lay a tax upon any property on which the Government can lay its hands, whether within or without the jurisdiction of the United States. If, in

⁹⁵ 106 U. S. (16 Otto) 327.

imitation of the dues levied by Denmark upon vessels passing through the Cattegat Sound, Congress should levy a duty upon all vessels passing through the Strait of Florida, I do not know of any power which the courts possess to prevent it. It might create complications with foreign Governments, it is true, and involve the country in war, but Congress has the power, if it chooses to take the responsibility, of creating, or giving occasion to such complications. The responsibility rests upon it alone."

Justice Field, in a dissenting opinion rendered in this case, took the position that the tax involved was upon the income of non-resident aliens and nothing else. Upon this point he was in agreement with Justices Bradley and Harlan, but, differing from them, he declared that, from the very nature of political authority, a sovereign State is without legal right to tax the incomes of persons over whom it has no jurisdiction either by way of citizenship or residence. "The foreign owner of these bonds," he said, quoting the language the lower court had used, "was not in any respect subject to the jurisdiction of the United States, neither was this portion of his income. His debtor [the company] was, and so was the money of his debtor, but the money of his debtor did not become a part of his income until it was paid to him, and in this case the payment was outside of the United States in accordance with the obligations of the contract which he held." "There are," continued Justice Field, "limitations upon the powers of all governments, without any express designation of them in their organic law; limitations which inhere in their very nature and structure, and this is one of them—that no rightful authority can be exercised by them over alien subjects, or citizens abroad or over their property there situated."

Here it is clear that Justice Field fell back upon a doctrine of what may be termed natural or inherent limitations—limitations derived from no legal source, but imposed by the very nature of things, and as a matter of absolute ethical obligation.

It is, indeed, surprising that this justice should have been willing to give his support to a theory that, long before his time, had been thoroughly discredited, and in support of which he could adduce no judicial precedents. He did, indeed, assert that the courts in England had considered the doctrine to be so obligatory upon them that, where general terms used in acts of Parliament seemed to contravene it, they had narrowed the construction so as to avoid that result. But, admitting this to be true, this is far from a declaration by the English courts that, in cases where, because of the explicit language used, it was not possible to escape by means of construction from the force of parliamentary commands, they would in this or any other case, refuse to recognize the validity of such commands.⁹⁶

⁹⁶ Justice Field also cites the case of *The Apollon* (9 Wheaton, 362), which, however, does not support, except possibly in an *obiter* manner, the doctrine in whose behalf Justice Field adduces it.

The question of the situs of property for the purposes of taxation is an especially acute one with reference to income taxes. Both in England and the United States such taxes have been imposed upon persons, whether citizens or not, and whether resident or not, with respect to profits derived from business enterprises carried on within the respective territories of the taxing states.

In the United States the acts of 1861 and 1864 confined the tax to residents and to citizens residing abroad, but the act of 1866 added the provision: "And a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business trade, or profession carried on in the United States by persons residing without the United States, not citizens thereof"; and this same or a similar provision was embodied in the acts of 1870, 1894 and 1913. Similar provisions are also to be found in the income tax laws of some of the States of the American Union, and, in the case of *Shaffer v. Carter*,⁹⁷ decided in 1920, the constitutionality of these acts was examined by the Supreme Court of the United States.

In the case of *Shaffer v. Carter* one of the questions involved was as to the constitutionality of a tax levied by the State of Oklahoma upon net incomes derived by non-residents from property owned by them within the State and from business or professions carried on by them within its borders. The law was upheld, the court saying:

"We deem it clear, upon principle as well as on authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon income accruing to non-residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders.⁹⁸ . . . The very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally, yet to the extent of his property held or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State."

This last qualification as to equality of treatment between residents and non-residents being one specially imposed upon the States of the American Union by the Federal Constitution, would not apply to the Federal Government in its dealings with non-residents in foreign States.

⁹⁷ 252 U. S. 37. See also *Travis v. Yale and Towne Manufacturing Co.* (252 U. S. 60).

⁹⁸ The court, in this statement, introduced the qualification that the tax upon non-residents should not be more onerous than upon residents, because of the express provision of the Federal Constitution that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" (Art. IV, Sec. 2).

To the contention that the income tax in question was, in its very nature, a personal one, or a "subjective tax imposing personal liability upon the recipient of the income," and, therefore, as to a non-resident, beyond the jurisdictional power of the State, the court replied that the essential point was as to its practical operation and effect,—“the personal element cannot, by any fiction, oust the jurisdiction of the State within which the income actually arises and whose authority over it operates *in rem*.”

In the case of *De Ganay v. Lederer*,⁹⁹ decided in 1919, the Supreme Court of the United States upheld the Federal income tax law as to the income from stocks and bonds of corporations organized under laws of the United States, and from bonds and mortgages secured upon property in the United States, owned by a non-resident alien, which income was collected and transmitted to such alien by an agent domiciled in the United States who had physical possession of the securities under a power of attorney which gave him authority to sell, assign or transfer any of them and to invest or reinvest the proceeds from such sales. These being the circumstances, the court declared that the securities constituted property which had its situs in the United States. To the contention of counsel that certificates of stock, bonds and mortgages are not themselves property but merely evidences of ownership of property, the court replied that, in general parlance and usage, they are so considered, and that the words of the congressional statute are to be construed in the light of such usage. As to the situs of this property, the court said that the maxim *mobilia sequuntur personam* declares what, in many cases, is but a fiction which has to yield when the facts and circumstances of cases require it, and that there is abundant judicial authority (citing cases) that notes, bonds and mortgages may acquire a situs at a place other than the domicile of their owners and be there reached by the taxing power.¹⁰⁰

In *Buck v. Beach*,¹⁰¹ the Supreme Court held that the mere presence of promissory notes within the State was not sufficient to create a situs, for purposes of taxation by that State, of the intangible personalty represented

⁹⁹ 250 U. S. 376.

¹⁰⁰ Quoting a decision of a State court (*Jefferson v. Smith*, 88 N. Y. 576), the Supreme Court said: "It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property, and not as the mere evidences of debts, and that they may thus have a situs at the place where they are found, like other visible tangible chattels."

As to the conformity of the doctrine of the instant case with that of the case of *State Tax on Foreign Held Bonds* (15 Wallace, 300), the court said: "The taxation in that case was on the interest on bonds held out of the State. Bonds and negotiable instruments are more than mere evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions."

¹⁰¹ 206 U. S. 392.

by such instruments, and that it was immaterial that these instruments had been sent into the State by their owner in order to avoid taxation upon them by the State of his residence. The court said: "The debts here in question were not property within the State of Indiana, nor were the promissory notes themselves, which were only evidence of such debts. The rule giving jurisdiction where the specialty may be found has no application to a promissory note."

Upon the other hand, in *Metropolitan Life Insurance Co. v. New Orleans*,¹⁰² the court held that a company could not escape taxation by sending the evidences of credits outside of the State, when there were other reasons why the company should be taxed upon them. In this case the plaintiff, a foreign corporation, was doing business within the State and the court said: "The State undertook to tax the capital employed in the business precisely as it taxed the capital of its own citizens in like situation. For the purpose of arriving at the amount of capital actually employed it caused the credits arising out of the business to be assessed. We think the State had the power to do this, and that the foreigner doing business cannot escape taxation upon his capital by removing temporarily from the State evidences of credits in the form of notes. Under such circumstances they have a taxable situs in the State of their origin."¹⁰³

A careful examination of the cases which have been reviewed shows that not yet has the Supreme Court of the United States found it necessary to pass squarely upon the jurisdictional power of the United States to tax non-resident aliens upon intangible personalty which cannot be construed to be actually or physically within the United States, or to be of the nature of a license or excise or franchise tax upon business carried on within, or special corporate rights granted by, the United States.¹⁰⁴

The present Federal income tax law requires the payment by non-resident aliens of a tax assessed upon incomes derived by them from all property owned or from any business or profession carried on in the United States. This tax, it is to be observed, is collected in many cases by the United States, not directly from the recipients of the income but from the corporations or concerns which earn it, and before it is paid over to those to whom it is due. It yet remains to be seen whether the Supreme Court will find itself able to hold that such income is property within the United States, even though the instruments evidencing the ownership of the property from which the income is derived are not physically within the United States, and the owners are non-resident aliens and have no agents in the United States for the collection, or collection and reinvestment, of the incomes due them. If, however, one may judge by the general trend of the cases

¹⁰² 205 U. S. 395.

¹⁰³ Justices Day and Brewer dissented.

¹⁰⁴ In *R. R. v. Jackson* (7 Wallace, 262), the court held that Congress had not intended, by its Income Tax Law of 1864, to tax incomes of non-resident aliens.

that have been reviewed, it is more than likely that the Supreme Court, when the question is presented to it, will uphold the Federal law in this respect. If it should do so, it would of course be within the right of foreign Governments to hold that such income cannot properly be deemed to be property within the United States, and, therefore, to complain that the United States, taking advantage of the fact that it has within its actual control the property or businesses from which such income is derived, is improperly withholding property from the citizens of the complaining States, who are not residing and have no domicile in, and own no property located within, the United States. In other words, they might admit, as, of course, they would be compelled to admit, that the United States may tax business carried on or property located within its borders or the income derived therefrom, but that it cannot justly tax the income of non-resident aliens merely by reason of the fact that such income is derived from the earnings of such businesses or property: that the payments due to their own citizens remain the property of the concerns earning them until they are paid over to the persons to whom they are due, and that only when so paid to and received by these creditors do they become income, by which time, in the case of non-resident aliens, they will have passed beyond the jurisdiction of the United States.

Such an argument as this would of course be valid only as a matter of right or as a rule sanctioned by generally accepted international law. It would have no force in municipal courts. For them, as has been so often reiterated, the only question would be as to what the municipal law provided. If, in bald terms, the statute should declare that a tax should be levied personally upon non-resident aliens, who owned no property within the State, who derived no income from property located or business carried on within the State, or that a tax should be levied upon alien-owned property located outside of the State, the courts of the enacting State would be bound to recognize the validity of such a law. The courts, when called upon to issue a decree in enforcement of such taxes might not be able to find any property within its jurisdiction against which a judgment *in rem* could be entered and enforced, but, if the municipal law so provided, it might enter a judgment *in personam* in default against the defendant, which might be satisfied out of property within the jurisdiction of the court which, at some later time, the defendant might come into possession of. It scarcely need be said that if the attempt were made to institute proceedings in a foreign jurisdiction to collect this judgment out of property there located and owned by the defendant, the courts of that State would be justified in refusing to give force to the judgment decrees, which, as to itself, would be foreign ones.¹⁰⁵

¹⁰⁵ For an interesting discussion of movements that have been made to obtain an international agreement and harmony of practice with regard to the taxation of in-

A possible constitutional difficulty peculiar to the United States with reference to income taxation and not related to the implications of its sovereignty, is that raised by the power of Congress under the Federal Constitution to levy direct taxes. Should it take the position which has been indicated, the court would have to hold that the tax thus collected was an income tax even though the jurisdiction to levy it was founded upon the proposition that the interest of the non-resident aliens in the earnings of the property or business represented by the stock, bonds or mortgages held by them, constituted property within the jurisdiction of the United States. For if the tax were not still regarded as upon incomes it would be a direct tax not covered by the Seventeenth Amendment to the Federal Constitution, and would therefore have to be apportioned among the States of the Union according to their respective populations.¹⁰⁶

The Supreme Court of the United States, in the case of *Cook v. Tait*,¹⁰⁷ decided that the United States might impose a tax on income received by an American citizen who, at the time the income was received, was permanently resident and domiciled in a foreign country; the income being derived from property located in that country. The scope and the power of a sovereign State to tax, it was declared, "is based on the presumption that government by its very nature benefits the citizen and his property wherever found." This doctrine, it was asserted, was implicit in the holding of the court in *United States v. Bennett*,¹⁰⁸ which, in effect, held that "the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon the relation of the latter to him as citizen."

§ 413. Borrowing Power: Currency: Legal Tender.

The Federal Government is given power "to borrow money on the credit of the United States."

The power thus given is free from limitations. In the draft of the Constitution reported by the Committee on Detail to the Constitutional Convention, the provision read, "To borrow money and emit bills on the credit of the United States." The express authorization to emit bills of credit

tangible personal property, especially with reference to incomes, see the article by G. G. Cough, "International Comity in Taxation" in the *Journal of Political Economy* for April, 1923, Vol. XXXI, p. 262.

¹⁰⁶ Article I, Section 9, Paragraph 4, of the Federal Constitution provides: "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The Seventeenth Amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration."

¹⁰⁷ 265 U. S. 47.

¹⁰⁸ 232 U. S. 299.

was stricken out by the Convention, but, apparently, not with the intention of thereby depriving the United States of the power, but because of the view that the power would be included in the general authority to borrow money. That this is so, has not been questioned by the courts. There has, however, been serious controversy as to the power of the United States to give a legal tender character to these bills when issued.

The debates in the Constitutional Convention, and various provisions of the Constitution,¹⁰⁹ would seem to indicate an intention upon the part of the framers of the Constitution that a legal tender character may be given by Congress only to the metallic money coined by the United States, and the Supreme Court in *Hepburn v. Griswold*¹¹⁰ so held as regards the payment of debts between private parties created before the enactment of the law. In *Knox v. Lee*,¹¹¹ however, four justices dissenting, this doctrine was overthrown, and the issuance of legal tender notes authorized as a legitimate war power. And finally, in the Legal Tender cases—*Juillard v. Greenman*¹¹² the authority in question was conceded to exist as implied in the general power to borrow money, whether in times of peace or of war, the court saying: "Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as a matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts."

In *Knox v. Lee* it is to be observed that the legal tender power is deduced not wholly from the power to borrow money but from the ensemble of powers which are granted to the United States, which aggregate of powers, the court holds, evidences the intention to equip the Central Government with all the powers necessary for its maintenance as an effective sovereign State. The doctrine thus comes perilously near to an acceptance of the doctrine of "inherent sovereign powers."¹¹³ Also the court declares that it is not indispensable to the existence of any power claimed for the Federal Government that it should be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers, but that its existence may be deduced from a combination of several expressly granted powers.

The various powers from which, in the aggregate, the legal tender power is derived are summarized in the following paragraph, taken from the opinion of the court in *Juillard v. Greenman*:

¹⁰⁹ Cf. Tucker's argument, *The Constitution of the United States*, I, 508ff.

¹¹⁰ 8 Wall. 603.

¹¹² 110 U. S. 421.

¹¹¹ 12 Wall. 457.

¹¹³ See § 58 of this treatise.

"Congress as the legislature of a sovereign Nation, being expressly empowered by the Constitution to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States, and to borrow money on the credit of the United States, and to coin money and regulate the value thereof and of foreign coin; and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks and to provide a national currency for the whole people, in the form of coin, treasury notes and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized Nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution and, therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the Government of the United States.'"

As regards the contention that the effect of applying the legal tender law to prior contracted debts is to deprive the creditor of property without due process of law, in violation of the Fifth Amendment, the court in *Knox v. Lee* said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses, may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that because of this a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared."

That a contract providing specifically for the payment of gold may not be discharged by the tender of legal tender paper money of the United States is established.¹¹⁴

That the power to issue securities, as an incident to the constitutional power of the United States to borrow money may not be controlled or in any way directly interfered with by the States, is not disputed.¹¹⁵

¹¹⁴ *Bronson v. Rhodes* (7 Wall. 229); *Hepburn v. Griswold* (8 Wall. 607); *Gregory v. Morris* (96 U. S. 625). As to the possibility of contracting or prohibiting the entering into of gold specie contracts, see the article by S. P. Breckinridge, "Specie Contracts" in *Sound Money*, Vol. XI, p. 1.

¹¹⁵ *McCulloch v. Maryland* (4 Wh. 439); *Bank Tax Cases* (2 Wall. 200); *Palmer v. McMahon* (133 U. S. 666).

CHAPTER XLIII

INTERSTATE AND FOREIGN COMMERCE

§ 414. Developing Importance of the Commerce Clause.

By Clause 3 of Section 8 of Article I of the Constitution, known as the Commerce Clause, Congress is given the power to "regulate commerce with foreign nations and among the several States, and with the Indian Tribes."

The full importance of the grant of authority contained in this clause did not appear for many years after the adoption of the Constitution. Not until 1824 by the decision of the Supreme Court in *Gibbons v. Ogden*¹ was a clear indication given of the extent of the power granted, and not until the Constitution was nearly a hundred years old did Congress begin the exercise of the authority granted it to regulate, affirmatively, commerce between the States. In Prentice and Egan's able treatise² it is observed that "before the year 1840 the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to twenty; in 1870 the number was thirty; by 1880 the number had increased to seventy-seven; in 1890 it was one hundred and fifty-eight; while at present [1898] it is not less than two hundred and thirteen. In the State courts and United States Circuit and District courts the progress is not less significant. In 1840 this clause of the Constitution had been involved in those courts in fifty-eight cases only. In 1860 the number had increased to one hundred and sixty-four; in 1870 it was two hundred and thirty-eight; in 1880 it was four hundred and ninety-four; in 1890 it was eight hundred, while at the present time [1898] it is nearly fourteen hundred." These figures fully justify the remark that "such a history as this can, it is believed, find its parallel in no other branch of constitutional law."

§ 415. Purpose of the Commerce Clause.

There can be but little question that the chief and possibly the entire purpose of the Commerce Clause was, as far as interstate commerce was concerned, to empower the Federal authorities to prevent the States from interfering with the freedom of commercial intercourse between themselves or with foreign nations; but, as the court observed in *Addyston Pipe & Steel Co. v. United States*,³ "The reasons which may have caused the framers of

¹ 9 Wh. 1.

² *The Commerce Clause of the Federal Constitution* (1898), p. 14.

³ 175 U. S. 211. In the *Passenger Cases*, 7 How. 283, Justice Woodbury said: "It was a difference between the States as to imposts or duties on imports and tonnage

the Constitution to repose power to regulate interstate commerce in Congress do not affect or limit the extent of the power itself." This is to say, the power being granted without qualification, except as to preference of the ports of one State over those of another, extrinsic evidence may not be resorted to in order to give to the grant a meaning narrower than that which its words convey.

§ 416. Constitutional Source of the Right to Engage in Interstate and Foreign Commerce.

It is of fundamental importance to determine whether the right of the individual or of a corporation to engage in interstate commerce exists independently of the Federal Constitution and is merely subject to regulation by Congress, or whether the right is one wholly of Federal creation; for, if it be determined that the latter is the case, Congress can be argued to have a right of exclusion from such commerce that could be more drastically and even arbitrarily used than if the former premise were accepted.

An examination of the judicial dicta upon this point shows that, upon numerous occasions, the right has been declared to be distinctly a Federal right, but not, it is believed, in the sense that it is a right dependent for its very existence upon Federal law, but only as one guaranteed by the Constitution against State impairment or regulation. In *Gibbons v. Ogden* ⁴ Marshall's language was precisely to this effect. He said: "In pursuing this inquiry at the bar it has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. That is true. The Constitution found it an existing right and gave to Congress the power to regulate it." This is quoted and approved by Chief Justice Fuller in a dissenting opinion in *Dooley v. United States*.⁵ So, also, as said by Justice Clifford in his dissenting opinion in *Gilman v. Philadelphia*:⁶ "The right of intercourse between State and State was a common law privilege and as such was fully recognized and respected before the Constitution was framed. Those who framed the instrument found it an existing right and regarding the right as one of high national interest, they gave to Congress the power to regulate it."

In *Vance v. Vandercook* ⁷ the court declared that "the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States, and does not rest on the grant of State law," and in *Crutcher v. Kentucky*,⁸ the court said: "To

which embarrassed their intercourse with each other and with foreign nations, and which mainly led to the Constitution and not the mere regulation of commerce."

⁴ 9 Wh. 1.

⁵ 183 U. S. 151.

⁶ 3 Wall. 713.

⁷ 170 U. S. 438.

⁸ 141 U. S. 47.

carry on interstate commerce is not a franchise or a privilege granted by a State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States: and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contract regulation on the subject."

These and similar declarations of the Supreme Court, it is seen, go no further than to exclude foreign and interstate commerce from State control. They do not go to the extent of holding that the existence of the right is dependent upon congressional enactment;—indeed, they practically negative this by asserting that the right is one recognized and protected by the Constitution.

In the *Employers' Liability* case⁹ the proposition was urged that a corporation by engaging in interstate commerce subjects itself to possible Federal regulations as to all of its activities, those which do not have a relation to interstate commerce as well as to those which have. This doctrine the court repudiated, saying that it rests upon the conception "that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the control of Congress." "It is apparent," the court continued, "that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been and must be, under their control, so long as the Constitution endured."

§ 417. Federal Control of Foreign Commerce Wider than Its Control of Interstate Commerce.¹⁰

The same clause which gives to Congress the power to regulate commerce among the States extends the power to commerce with foreign nations. It has been declared that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."¹¹ This is true, and yet the control which the United States may exercise over foreign commerce is broader than that which it may exercise over interstate commerce for the reason that it is able

⁹ *Howard v. Ill. Cen. Ry.* (207 U. S. 463).

¹⁰ For further discussion of foreign as distinguished from interstate commerce, see Section 576.

¹¹ *Brown v. Houston* (114 U. S. 622).

to draw additional extent from constitutional sources other than the Commerce Clause. Thus, especially from the exclusive and plenary authority over foreign relations, granted to it, the Federal Government is able to control the admission of aliens, to provide for their deportation, to grant special commercial privileges by treaty, and to lay a total or partial embargo upon foreign commerce.

As has been already seen, it is held that the prohibition laid upon the States that they shall not, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, has been held to impose upon them limitations which do not apply to interstate commerce.¹² "In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State. This principle is, if possible, still more clear when applied to commerce 'among the several States.'"¹³

In *Buttfield v. Stranahan*¹⁴ the court indicated plainly that, with regard to foreign commerce, Congress might act free from limitations which would apply to interstate commerce. However, so far as its authority is gained from the Commerce Clause, it has been repeatedly declared that the extent of the power of Congress over interstate commerce is as extensive as that over foreign commerce. Thus, in *Gibbons v. Ogden*,¹⁵ speaking of the authority over interstate commerce, the court said: "It is a power vested in Congress as absolute as it would be in a single government having in its Constitution the same restrictions in the exercise of the power as found in the Constitution of the United States." Again, in *Crutcher v. Kentucky*¹⁶ the court said, but without citing cases: "It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce," and, after pointing out that this power over foreign commerce includes the responsibility and duty of "providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce," the declaration is made that

¹² *Woodruff v. Parham* (8 Wall. 123); *Brown v. Houston* (114 U. S. 622).

¹³ *Gibbons v. Ogden* (9 Wh. 1).

¹⁴ 192 U. S. 170; 48 L. ed. 525.

¹⁵ 9 Wh. 1.

¹⁶ 141 U. S. 47.

"the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two."

Again, in *Bowman v. Chicago and Northwestern R. Co.*,¹⁷ the court said: "The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms and the two powers are undoubtedly of the same class and character and equally extensive."

The foregoing view has, however, not gone wholly uncontradicted. For example, in their dissenting opinion in the *Lottery case*,¹⁸ the four justices said: "It is argued that the power to regulate commerce among the several States is the same as the power to regulate commerce with the foreign nations, and with the Indian tribes. But is its scope the same? . . . The power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign Nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case would not be necessary or proper in the other. Congress is forbidden to lay any tax or duty on articles exported from any State, and, while that has been applied to exports to a foreign country, it seems to me that it was plainly intended to apply to interstate exportation as well; Congress is forbidden to give preference by any regulation of commerce or revenue to the ports of one State over those of another; and duties, imposts and excises must be uniform throughout the United States. 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' This clause of the second section of Article 4 was taken from the 4th Article of Confederation which provided that 'the free inhabitant of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce,' while other parts of the same Article were also brought forward in Article 4 of the Constitution. Mr. Justice Miller in the *Slaughter House cases*,¹⁹ says that there can be little question that the purpose of the 4th Article of the Confederation, and of this particular clause of the Constitution 'is the same, and that the privileges and immunities intended are the same in each.' Thus it

¹⁷ 125 U. S. 465.

¹⁸ *Champion v. Ames* (188 U. S. 321).

¹⁹ 16 Wall. 36.

is seen that the right of passage of persons and property from one State to another cannot be prohibited by Congress. But that does not challenge the legislative power of a sovereign Nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures."

Whether or not it be proper to hold that the power given to Congress by the Commerce Clause is, by design or by reason of its very nature, different in the case of foreign commerce from what it is with reference to interstate commerce, the fact is, as has been earlier mentioned, that Congress can constitutionally regulate foreign commerce in ways that would not be permitted when interstate commerce is dealt with. Thus, in *Groves v. Slaughter*,²⁰ we find the court saying: "The power to regulate commerce among the several States is given in the same section and in the same language [as that to regulate foreign commerce]. But it does not follow that the power may be exercised to the same extent. . . . The United States are considered as a unit in all regulations of foreign commerce, but this cannot be the case where the regulations are to operate among the several States. The law must be equal and general in its provisions. Congress cannot pass a non-intercourse law, as among the several States; nor impose an embargo that shall affect only a part of them."

With reference to the authority of Congress over foreign commerce, a leading case is *Buttfield v. Stranahan*.²¹ In this case was questioned the constitutionality of the act of Congress of March 2, 1897, prohibiting the importation of teas when found to be inferior in purity, quality, and fitness for consumption, as tested by standards to be established by the Secretary of the Treasury upon recommendation of a Board of tea experts. In answer to the contention of the plaintiff in error that this prohibition of importation was not within the regulative power of Congress, and, if enforced, would operate, as to him, as a deprivation of his property without due process of law, the court said: "Whatever difference of opinion, if any, may have existed, or does exist concerning the limitation of the [commerce] power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries: not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to admission into the United

²⁰ 15 Pet. 449.

²¹ 192 U. S. 470.

States, and excluding such as did not equal the standards adopted. 9 Stat. at L. 237, chap. 70, Rev. Stat. Sec. 2933, U. S. Comp. Stat. 1901, p. 1936."

"The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes, the court continued. "And this last power was referred to in *United States v. 43 Gallons of Whiskey*, 93 U. S. 194, as exclusive and absolute, and was declared to be 'as broad and as free from restrictions as that to regulate commerce with foreign nations.' In that case it was held that it was competent for Congress to extend the prohibition against the unlicensed introduction and sale of spirituous liquors in the Indian Country to territory in proximity to that occupied by the Indians, thus restricting commerce with them. We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards. As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."

The language which has been quoted contains, it is seen, the statement that Congress has from the beginning claimed and exercised the police power to exclude merchandise "at its discretion," and this claim and exercise of power is evidently approved by the Court. It is not certain, however, that the case can be held authority for the doctrine that this power of exclusion is one which, under the commerce power, can be *arbitrarily* exercised by Congress, that is, irrespective of police considerations, for in this case, the court went on to show that in fact the exclusion was not an arbitrary one, but was based on proper considerations of public policy. The language of the last two sentences is, indeed, very broad, but, construed in connection with the remainder of the opinion, and the facts of the case, it really goes no further than to hold that the individual has not a vested right to trade with foreign countries which is so broad as to prevent reasonable police and administrative regulations by Congress as to the commodities that may be imported, their classification and their grading for purposes of taxation.

§ 418. Preference to Ports.

The limitation laid by Clause 6 of Section IX of the Constitution with regard to the giving of preference to ports of one State over those of another has been already considered in an earlier section.²²

²² See § 403.

must itself be involved, or that the transactions, in order to be held to be subject to congressional regulation under the Commerce Clause, must be directly and integrally related to such transportation.

The Supreme Court, it is to be observed, has been liberal in its findings as to the fact of transportation being involved in a transaction. Thus, for example, it held that transportation was present when sheep were driven across State lines.³⁰

§ 424. Commerce and Intercourse Distinguished. Is Trade for Profit Essential to Commerce?

A fair interpretation of the term "commerce" as used in the clause of the Constitution giving to Congress the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes," would seem to require that, in order to bring a transaction or instrumentality or commodity within the regulatory power thus given there would have to be involved at some point a commercial element, that is, one of trade or exchange of goods or of services made or rendered for profit. The Supreme Court, however, seems to have committed itself to the proposition that this is not so, with the result that the crossing of persons from one State to another State in their own vehicles, as for example, motor cars, or in the privately owned vehicles of others, for use of which no charge is made, or the sending or carrying of goods across State lines for any purposes whatever, whether commercial or not, constitutes interstate commerce within the constitutional meaning of the term. As thus defined by the Supreme Court, commerce has come to mean intercourse.

The tendency to give to commerce this broad constitutional meaning was shown in the case of *Gibbons v. Ogden*,³¹ in which Chief Justice Marshall gave for the first time a careful examination of the extent of the Federal power under the commerce power, and the corresponding limitations upon the authority of the States to deal with the subject. In that case, which will later be more fully examined, Marshall said: "The subject to be regulated is commerce; and. . . it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects to one of its significations; commerce is undoubtedly traffic, but it is something more; it is intercourse."

In this case the question presented was as to the power of a State to grant to steam vessels the right of navigating the waters within its borders to the exclusion of vessels licensed under Federal law, and Marshall was concerned to bring navigation within the scope of commerce, and, there-

³⁰ *Kelley v. Rhoads* (188 U. S. 1).

³¹ 9 Wh. 1.

fore, as to interstate navigation, within the regulatory power of Congress. The case is, therefore, authority only as to this point, and the assertion, in general terms, that commerce is intercourse, is *obiter*. And, even thus, Marshall did not say that all intercourse, whether or not embracing a traffic or transportation for gain, is commerce. However, the identification of the two terms thus started upon its course has remained, although, as will be seen, there have been comparatively few cases in which the Supreme Court has found it necessary to define as interstate commerce transactions between the States or across State lines which, though constituting intercourse, have lacked a commercial element in the economic sense of the term.

In the opinion of the court in *Pennsylvania v. Wheeling and Belmont Bridge Co.*³² again occurs the statement that the commercial power of Congress includes the right to regulate intercourse.

In *Mobile v. Kimball*,³³ it is held that the transportation of persons across State lines or between the United States and foreign countries is commerce without regard to the purpose for which such persons obtain transportation, the court saying: "Commerce with foreign countries and among the several States strictly considered consists in intercourse and traffic, including in these terms navigation and the transit of persons and property, as well as the purchase, sale, and exchange of commodities."³⁴

In *Covington Bridge Co. v. Kentucky*³⁵ it was held that a State had not the power, without the consent of Congress, to impose tolls upon persons crossing a bridge connecting one State with another State, the court saying "the thousands of persons who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

Despite the generality of the language used in these cases, it will be observed that in none of them was the commercial element wholly lacking, for, although the persons concerned were not themselves crossing State lines for purposes of trade or other business, they were being transported by carriers which were engaged in such transportation for purpose of financial gain; and, in the *Covington* case, the bridge was itself maintained and operated by its owners for purposes of gain.

However, in later cases we have instances in which even this distinctively commercial element was lacking. In these cases the court, instead of employing the term or idea of "intercourse" emphasized the element of "transportation," and, in effect, held that whenever a commodity is

³² 18 Wall. 421.

³³ 102 U. S. 691.

³⁴ See also to the same effect, *Lord v. Steamship Co.* (102 U. S. 544). In the opinion in *Railway v. Husen* (95 U. S. 465) occurs the statement: "Transportation is essential to commerce, or rather is commerce itself."

³⁵ 154 U. S. 204.

carried across State lines, whatever may be the purpose of the carrying, or the means, public or private, by which it is carried, interstate commerce results. Thus, in *United States v. Simpson*,³⁶ the court applied the Federal Act of March 3, 1917, prohibiting the transportation of intoxicating liquors in interstate commerce to the interstate transportation of liquor by its owner in his own automobile and for his own personal use. The court said: "The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being the national import of its words. . . . And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit."³⁷ At all events we perceive no reason for rejecting the natural import of its words and holding that it was confined to transportation for hire or by public carriers. . . . That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. This was settled in *United States v. Hill*."³⁸

The court treated this case as one merely of statutory construction, and did not deem it necessary even to discuss the question whether, by the construction which it gave to the act, it extended its force beyond the constitutional scope of congressional power. Justice Clarke, however, in a dissenting opinion, was strongly of the opinion that this was the result of the court's action. He said:

"By early (*Gibbons v. Ogden*, 9 Wheat. 1) and by recent decisions (*Second Employers' Liability Cases*, 223 U. S. 1) of this court and by the latest authoritative dictionaries, interstate commerce, in the constitutional sense, is defined to mean commercial business, intercourse—including the transportation of passengers and property—carried on between the inhabitants of two or more of the United States,—especially (we are dealing here with property) the exchange, buying or selling of commodities, of merchandise, on a large scale between the inhabitants of different States. The liquor involved in this case, after it was purchased and while it was being held for the personal use of the defendant, was, certainly, withdrawn from trade or commerce as thus defined—it was no longer in the channels of commerce, of trade or of business of any kind—and when it was carried by its owner, for his personal use, across a State line, in my judgment it was not moved or transported in interstate commerce, within

³⁶ 252 U. S. 465.

³⁷ Citing *Kermeyer v. Kansas* (236 U. S. 568).

³⁸ 248 U. S. 420. In that case the court held that the transportation of intoxicating liquor upon the person of one who is himself being carried in interstate commerce is, in itself, interstate commerce.

the scope of the act of Congress relied upon or of any legislation which Congress had the constitutional power to enact with respect to it at the time the Reed Amendment was approved. The grant of power to Congress is over Commerce,—not over isolated movements of small amounts of private property, by private persons for their personal use.”

Justice Clarke had also dissented in *United States v. Hill*.³⁹

In a later section,⁴⁰ consideration will be given to the interpretation and application by the courts to the so-called Mann Act of June 25, 1910,⁴¹ by which Congress has sought, through the exercise of its commerce power, to discourage the so-called White Slave Traffic. By this act it is made an offence knowingly to transport or cause to be transported in interstate commerce, any woman or girl for the purpose of prostitution or for any other immoral purpose, or with the intent or purpose to induce such woman or girl to become a prostitute or to engage in any other immoral practice. This act is here of importance since it has been upheld as applied to such transportation of women even when there has been present no idea or expectation of pecuniary gain by any of the parties. The mere fact of transportation has been declared sufficient to make the law apply. The leading case upon this point is *Caminetti v. United States*,⁴² in which the court in its majority opinion, said: “The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral injurious uses has been frequently sustained and is no longer open to question.”

However, it is to be observed that in this case though there was present no element of pecuniary gain upon the part of the defendants who procured the transportation of the woman involved, or of pecuniary gain upon her part, there was transportation by a public carrier engaged for profit in interstate commerce.

In *Wilson v. United States*,⁴³ however, decided prior to the *Caminetti* case, the court had held immaterial for a prosecution under the act, or as a matter of the constitutionality of the act, whether the transportation of the girl or woman was or was not by a common carrier. The court said: “The prohibition is not in terms confined [by the Act] to transportation by common carrier, nor need such a limitation be implied in order to sustain the constitutionality of the enactment.”⁴⁴

With regard generally to the question whether, in order that a transaction may be said to be one of commerce, and, if crossing State lines, interstate commerce, there must be involved some element of trade or business

³⁹ 248 U. S. 420.

⁴⁰ Section 585.

⁴¹ 36 Stat. at L. 825.

⁴² 242 U. S. 470.

⁴³ 232 U. S. 563.

⁴⁴ In this case it appears that the plaintiff in error had given money to the women to defray their transportation and other expenses from Wisconsin to Illinois.

for financial profit, it seems to the author that but one answer can reasonably be given. There must be such an element. This element may enter in any one of a number of ways. If a carrier for hire is involved that is sufficient, whatever may be the purpose for which the persons or commodities are carried. If the person proceeds upon his own legs, or is carried in his own or any other private vehicle which is not a common carrier, there is no commerce, whatever may be the purpose of the going. If goods are carried by a person upon his own legs or in a private vehicle, or if, as in the case of sheep, they are driven on their own legs, the operation or transaction is a commercial one only if the goods or living being are being moved for the purpose of selling or using them for a financial profit or to effect delivery under such a sale or agreement for their use. It would seem, then, to the author, that an arbitrary and unwarranted extension of meaning has been given to the term commerce by the courts.

§ 425. Commerce Embraces Water Navigation.

As has been already seen, commerce includes navigation of the water, and, where this navigation is for the transportation of persons or goods to or from foreign countries or among the States, it is brought within the authority given to the Federal Government by the Commerce Clause. This was established once for all in *Gibbons v. Ogden*.⁴⁵ In that famous case, Marshall said: "The subject to be regulated is commerce. . . . The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter. . . . The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" ⁴⁶

⁴⁵ 9 Wh. 1; 6 L. ed. 23.

⁴⁶ At the time the Constitution was adopted almost all the commerce then being carried on among the States was by water, and there is considerable ground for believing that those who framed and adopted the Commerce Clause had exclusively in mind commerce by water. As to this see Prentice, *Federal Power over Carriers and Corporations*.

It is to be remembered that, during the early years under the Constitution, the admiralty jurisdiction of the United States was held to give it authority to regulate navigation only upon tidal waters and, therefore, it was then important to bring interstate navigation under the commercial power of Congress. However, the admiralty jurisdiction of the United States has since been held to extend over all waters, whether tidal or not, and whether extending across or between State boundaries or not. It is sufficient if they are used or are susceptible of being used as highways, or as links of highways over which trade and travel may be conducted between States or with foreign countries in order to bring them under the Federal admiralty jurisdiction. In a geographical sense, therefore, the admiralty jurisdiction of the United States has thus become broader than its commercial power, and, therefore, there is now no necessity of resorting to the commerce clause in search of authority for the regulation by Congress of matters of navigation. However, the fact that, in very many cases, the constitutional authority of Congress may be based upon either of these grants of power has, in a number of instances, caused the courts to leave uncertain in their opinions which of these sources of constitutional power they have relied upon in support of their affirmations of Federal authority as applied to the facts of the cases before them.⁴⁷

§ 426. Transportation of Persons Is Commerce.

That the transportation of persons is as much commerce as is the transportation of commodities has already appeared in preceding sections. There has been no doubt of this since it was declared in the early case of *New York v. Miln*.⁴⁸

Whether or not the mere walking of persons across State lines, and for purposes unconnected with any matters of trade or business for pecuniary profit, that is, in which there is present no element either of transportation or of commerce in the economic or financial sense of the word, the courts have had no occasion to say, but it would seem certain that the crossing of State lines under such circumstances cannot properly be described as interstate commerce, for there is absent the essential element of transportation. Such a crossing by persons cannot be prohibited or in any way restrained by the States, except for strictly police purposes, but this is not because of their lack of power to regulate interstate commerce, but for other reasons.⁴⁹

§ 427. The Instrumentalities of Commerce.

"The powers . . . granted by [the Commerce Clause] are not confined to the instrumentalities of commerce, or the postal service known

⁴⁷ See *post*, Chapter LXXIV for discussion of Admiralty Jurisdiction of the United States.

⁴⁸ 11 Pet. 102.

⁴⁹ See *ante*, § 167.

or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as the new agencies are successively brought into use to meet the demands of increasing population and wealth.”⁵⁰

The doctrine thus laid down in the *Pensacola* case has never been questioned. Telephonic messages are, of course, covered by it. No cases involving the transmission of wireless messages have been decided by the Supreme Court, but without doubt they will be treated as commerce, and the same would be true of messages and persons carried by aeroplanes and other apparatus for the navigation of the air.

§ 428. Trade-Marks and Interstate Commerce.

In Trade Mark cases⁵¹ it was held that the Commerce Clause gives to Congress no power to establish a general or universal system of trade-mark registration, that is, one which is not confined to trade-marks used in foreign or interstate commerce. Hence, the acts of 1870 and 1876, which were not so confined, were held invalid. However, in 1881, Congress enacted a law which was expressly confined in its operation to owners of trade-marks used in commerce with foreign nations or with the Indian tribes.⁵² This act did not purport to create trade-marks, but, assuming their existence, provided for their protection, and gave jurisdiction to the Federal courts to punish their infringement or enjoin their use or imitation by persons not the owners of them. The Supreme Court has found no occasion to question the constitutionality of this act.

§ 429. Vehicles Used by Interstate Carriers, but Not for Interstate Transportation.

*Southern R. Co. v. United States*⁵³ is authority for the proposition that cars, or, impliedly, other instrumentalities employed by railroads engaged in interstate commerce, are subject to regulation, as regards their safety equipment, by Congress, under its power to regulate interstate commerce, even though these instrumentalities are, in fact, employed in intrastate and not in interstate transportation. This case was a civil action to recover penalties for the violation of certain safety appliance acts of Congress, and question was raised not only as to whether the requirements of these acts were to be construed as applying to the case in question, but also,

⁵⁰ *Pensacola Tel. Co. v. W. U. Tel. Co.* (96 U. S. 1).

⁵¹ 100 U. S. 82.

⁵² 21 Stat. at L. 502.

⁵³ 220 U. S. 20.

if it was so held, whether Congress had the constitutional power so to provide. The court, answering both of these questions in the affirmative, said, with reference to the matter of statutory construction, that Congress had "intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce." As to the constitutional question, the court said: "Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

"Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

"These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."

§ 430. Electric Railways.

That electric railways transporting passengers or goods across State lines constitute interstate commerce, and are embraced within various of the acts of Congress for the regulation of such commerce was decided

in *United States v. Village of Hubbard, Ohio*.⁵⁴ Previously to this the Interstate Commerce Commission had repeatedly applied Federal laws to such roads.

§ 431. Bus Lines—Use of State Roads.

That motor bus or other kinds of bus lines transporting persons or goods across State lines are engaged in interstate commerce, and are as such, subject to Federal regulation, has not been questioned. Difficult questions have, however, arisen with reference to the rights of the States to regulate the use by such busses of State constructed or owned roads. These questions are considered in another place.⁵⁵

§ 432. Gas and Oil Pipe Lines.

By the present Interstate Commerce Act, Congress has not subjected to regulation the interstate transmission in pipes of natural or artificial gas, but that such transmission and the instrumentalities connected therewith are subject to regulation by Congress under the Commerce Clause, as well as the oil pipe lines which have been brought under Federal regulation, is well established.⁵⁶ This has been determined in cases in which has been examined the constitutional right of the States, by taxation or otherwise, to interfere with the interstate transmission or transportation of these commodities.

In *Public Utilities Commission v. Landon*⁵⁷ the court held that the retail sale of natural gas by local companies which obtained their gas through pipes from other States was not interstate commerce, although the local pipes were permanently connected with the interstate pipes. But, as the court pointed out in *Pennsylvania Gas Co. v. Public Service Commission*,⁵⁸ this determination had no bearing upon the interstate commercial character of the transmission of the gas through the interstate pipes. The case was authority only for the doctrine that the sale of the gas by the local companies was separable from its interstate transmission, and, as such, was to be treated as intrastate in character. In the instant case the gas was transmitted directly from the source of supply in the State of Pennsylvania to the consumers in the State of New York. "This transmission," said the court, "is continuous and single and is, in our opinion,

⁵⁴ 266 U. S. 473.

⁵⁵ See *post*, § 606.

⁵⁶ As to natural gas, see *West v. Kansas Natural Gas Co.* (221 U. S. 229); *Haskell v. Kansas Natural Gas Co.* (224 U. S. 217); *Western Union Tel. Co. v. Foster* (247 U. S. 105); *Public Utilities Commission v. Landon* (249 U. S. 236); *Pennsylvania Gas Co. v. Public Service Commission* (252 U. S. 23); *Pennsylvania v. West Virginia* (262 U. S. 623); *Missouri v. Kansas Natural Gas Co.* (265 U. S. 298); *United Fuel Gas Co. v. Hallanan* (257 U. S. 277).

⁵⁷ 249 U. S. 236.

⁵⁸ 252 U. S. 23.

a transmission in interstate commerce, and therefore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us."

In this case the court held that, until Congress asserted its superior power, a State might regulate the rates to be charged by local companies supplying gas to local consumers reached by pipes using the streets of a municipality, even though the gas was brought in pipes from another State.

In *Pennsylvania v. West Virginia*⁵⁹ however, it was held that gas, being a lawful article of commerce, a State could not require that interstate pipes lines should subordinate their interstate to their intrastate or domestic business, and, therefore, that a State law was unconstitutional which sought, with reference to national gas reduced to possession within the State, to prefer consumers within the State to those without the State, the supply of the gas in question not being adequate for both classes of consumers.⁶⁰

§ 433. Commodities of Commerce.

The commodities transported may be tangible and ponderable, or intangible and imponderable, as, for example, telegraphic, telephonic or wireless messages.⁶¹

By the amendment of 1910⁶² of the Interstate Commerce Act of 1887,⁶³ the Federal regulation of commerce was expressly extended over telegraphic, telephone and cable companies doing an interstate business. In its present amended form, Section I of the act declares: "That the provisions of this Act shall apply to common carriers engaged in—(a) the

⁵⁹ 262 U. S. 623.

⁶⁰ Justice Holmes dissented upon the grounds that the State statute in question applied to gas before it had begun to move in commerce, and, therefore, before it had become an article of interstate commerce; and also because, being a natural product of the State, the State had the right to conserve the supply. As to this latter point, he said: "I see nothing in the Commerce Clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages. If the gas were used only by private persons for their own purposes I know of no power in Congress to require them to devote it to public use or to transport it across State lines. It is the law of West Virginia alone that makes the West Virginian gas what is called a public utility, and how far it shall be such is a matter that the law alone decides. I am aware that there is some general language in *Oklahoma v. Kansas Gas Co.* (221 U. S. 229), a decision I thought wrong, implying that Pennsylvania might not keep its coal, or the northwest its timber, etc. But I confess I do not see what is to hinder." (Citing *Hudson County Water Co. v. McCarter*, 209 U. S. 349.) Upon this point Justice Brandeis agreed with Justice Holmes.

⁶¹ *Pensacola Tel. Co. v. W. U. Tel. Co.* (96 U. S. 1); *W. U. Tel. Co. v. Texas* (105 U. S. 460); *W. U. Tel. Co. v. Pendleton* (122 U. S. 347); *Leloup v. Mobile* (127 U. S. 640); *W. U. Tel. Co. v. Mass.* (125 U. S. 530).

⁶² 36 Stat. at L. 539.

⁶³ 24 Stat. at L. 379.

transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous shipment; or (b) the transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or (c) the transmission of intelligence by wire or wireless; from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory,⁶⁴ or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States." By Section 3 of the act it is declared that the term "Common Carrier" as employed in the act shall include "all pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire," and that the term "Railroad" as used in the act shall include "all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carriers operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the person or property designated herein, including all freight depots, yards and grounds, used or necessary in the transportation or delivery of any such property." The term "Transportation" is declared to include "locomotives, cars and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." The term "Transmission" is declared to include "the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages."⁶⁵

⁶⁴ The Federal right thus to control commerce wholly within a Territory is, of course, not derived from the Commerce Clause, but from the comprehensive jurisdiction of the Federal Government over Territories. See Chapter XXVI.

⁶⁵ It is clear that this would include the sending of photographs by wire or wireless.

§ 434. Aviation.

That the crossing above State lines by planes, balloons or other vessels navigating the air, is subject to Federal regulation under the Commerce Clause, there can be no reasonable doubt.⁶⁶

§ 435. The Buying or Selling of Bills of Exchange Is Not Interstate Commerce.

In *Nathan v. Louisiana*⁶⁷ the court laid down the doctrine that the buying and selling of foreign bills of exchange, while to be sure an aid to, and an instrument of, commerce, is not itself commerce. "The individual," said the court, "who uses his money and credit in buying and selling bills of

⁶⁶ These air ships can also be regulated under the postal and war powers of the United States, and, of course, the United States can operate such craft as parts of its military and naval forces. For the draft of a proposed act of Congress for the regulation in detail of air craft, see *Report of the American Bar Association*, 1923, p. 384.

⁶⁷ 8 How. 73.

Commenting on this case, Prentice and Egan say: "It seems, in view of the remarkable development of the banking system within the past fifty years, and its importance in relation to commerce, that the regulation of interstate and foreign bills of exchange might in time fall within the Federal commercial power. Where such bills represent payment for articles brought from other States, they may perhaps be considered to bear the same relation to the purchase, sale and exchange of commodities that freights and fares bear to their transportation. From another standpoint, bills of exchange may be said, in their relation to transportation of money, to bear some analogy to the relation which a system of free interchange of cars would bear to railroad traffic conducted in the absence of such a system. It is true, both of bills of exchange and of such a system of interchange of cars, that their relation to interstate transportation is in that they make such transportation to some extent unnecessary; and yet a State may not forbid this free interchange of cars, because to do so would place a new burden upon commerce among the States. To say that an interstate bill of exchange is merely evidence of the transfer of title to personal property located in another State is not only to ignore the fact that money, as the circulating medium, is essential to all commerce, but when sustained the argument seems to prove too much. If the bill of exchange be merely evidence of indebtedness in another State, it may be taxed at the discretion of the State within which it is drawn (*Kirtland v. Hotchkiss*, 100 U. S. 491); and it might, therefore, be prohibited by the State; for 'questions of power do not depend on the degree to which it may be exercised' (*Brown v. Maryland*, 12 Wh. 419). If this could be done, the statement that no burden could be placed upon interstate commerce by a State would be subject to substantial modification. It seems possible that the rule which would be applied in such a case would be stated in *Eric Railway Co. v. State* (31 N. J. L. 531), where it was held that 'whenever the taxation of a commodity would amount to a regulation of commerce, within the prohibition of the Constitution, so will the taxation of an inseparable incident or necessary concomitant of such commerce.' In *People v. Raymond* (34 Cal. 492), an act providing for the raising of revenue from a tax upon foreign and inland bills, and passengers, was held not to be in the nature of a police regulation, but an attempt at the regulation of commerce, and therefore void. On the other hand, in *Ex parte Martin* (7 Nev. 140) a statute requiring the fixing of revenue stamps to foreign bills of exchange was held to be a legitimate exercise by the State of its power of taxation." (*Commerce Clause of the Constitution*, p. 48.

§ 440. Stockyards and Packers.

The extent to which stockyards and the packing business may be regarded as instrumentalities of interstate commerce or as engaged therein, will receive examination in connection with the discussion of the Stockyards and Packers Act.⁷⁵

§ 441. Insurance Not Commerce.

The writing, selling, and transmission of insurance policies has been held not to be commerce.

That the business of fire insurance is not interstate commerce was decided in *Paul v. Virginia*.⁷⁶

That the business of marine insurance is not interstate commerce was held in *Hooper v. California*.⁷⁷

In *New York Life Ins. Co. v. Craven*⁷⁸ these cases are cited with approval and applied to life insurance, the court saying: "We repeat, the business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea. And we add, or against the uncertainty of man's mortality."

In *Paul v. Virginia* a State law which forbade any insurance company not incorporated by the State, from doing business in the State without a license, was held not to be a regulation of, or restraint upon, interstate commerce. To the argument that insurance is intercourse for the purpose of exchanging sums of money for promises of indemnity against losses, Justice Field, who rendered the majority opinion of the court, said: "The defect of the argument lies in the character of the business. Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce, in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to

tion. It is either preliminary or subsequent thereto. . . . Many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

⁷⁵ See Chapter L.

⁷⁶ 8 Wall. 168. See also *Liverpool & L. L. & Fire Ins. Co. v. Mass.* (10 Wall. 566); *Philadelphia Fire Assn. v. New York* (119 U. S. 110).

⁷⁷ 155 U. S. 648.

⁷⁸ 178 U. S. 389.

them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In *Hooper v. California* the court emphasized the distinction between interstate commerce or an instrumentality thereof, and the mere incidents of which insurance is one which may attend the carrying on of such commerce. "This distinction," the court declared, "has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with the trade between the States; and would exclude State control over many contracts purely domestic in their nature."

These decisions of the court in *Paul v. Virginia* and *Hooper v. California*, which have since served as the basis of decisions with reference to other forms of insurance, have, since their rendition, been severely criticized. And, especially during recent years, when, with the enormous growth of insurance companies doing a business national in character, the need for Federal regulation has seemed urgent to many, arguments have been put forth to show why the doctrine of the Supreme Court should be overruled, and companies doing an insurance business in more than one State be held to be engaged in interstate commerce.

The act of 1903 which created the Department of Commerce and Labor provided that the Department should have the power "to gather, compile, publish and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance." In Congress an effort was made to have a separate bureau of insurance provided for, and this project was abandoned only in the conference committee to which the bill went. In his annual message of December, 1904, President Roosevelt declared: "The business of insurance vitally affects the great mass of the people of the United States, and is national, and not local, in its application. It involves a multitude of transactions among the people of the different States and between American companies and foreign governments.

I urge that Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance."

In order to weaken the force of the cases already decided, it has been argued that in each of them the validity of a State law was involved and not the constitutionality of a Federal statute. Should an act of Congress, regulative of insurance, be passed and questioned in the courts, it is argued that a presumption in favor of its validity would exist which does not exist as to the invalidity of State laws claimed to be in violation of the commerce clause.

Furthermore, it is argued that the reasoning of the court in these decided cases has been defective in so far as it is based on the fact that a contract of insurance is not, in itself, an article of commerce. This, of course, is true, except in so far as it is treated as a piece of paper; but though not an article of commerce it is, it is argued, an instrument of commerce. Thus, for example, it is said, "Every contract of insurance is an agreement to pay, for which there is a sufficient consideration. Such being the substance of the contract, the final object of insurance, or of the insurance business, is an exchange of property. This fact stands out most clearly, perhaps, in life insurance, where A delivers annually to B a certain amount of property, and B, in return, at a given date, or upon the happening of a given event delivers to A or his appointee, a certain amount of property. The property usually consists of money." ⁷⁹

§ 442. Lotteries.

By act of March 2, 1893, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," ⁸⁰ the carriage of lottery tickets from one State to another, whether by mail, or by freight or express was absolutely prohibited. Two objections to the constitutionality of this measure were raised. First, that the regulative power given to the Federal Government over interstate commerce did not include the power absolutely to prohibit that commerce. This objection will be considered in a later section. Secondly, it was objected that lottery tickets are not articles of commerce,—the chief reliance for this contention being the decisions of the court as to bills of exchange and contracts of insurance.

After having been three times argued before the Supreme Court the Lottery Law was upheld in *Champion v. Ames*, ⁸¹ four justices dissenting. The majority, in their opinion, holding lottery tickets to be articles of commerce, said: "It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects

⁷⁹ *American Law Register*, December, 1900.

⁸⁰ 28 Stat. at L. 963.

⁸¹ 188 U. S. 321.

of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asunción, Paraguay. Money was placed on deposit at different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. (28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3179.) That fact is not without significance in view of what the court has said. That act, counsel for the accused well remarks, 'was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and prohibiting the importation of lottery matter from abroad, and to prohibit the act of causing lottery tickets to be carried, and lottery advertisements to be transferred from one State to another by any means or method.' We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States." ⁸²

⁸² In the minority opinion it was urged that the same reasoning which had been applied to hold bills of exchange and policies of insurance not to be articles of commerce was applicable to lottery tickets. "The lottery tickets," said Chief Justice Fuller, speaking for the minority, "purports to create contractual relations, and to furnish the means of enforcing a contract right. This is true of insurance policies, and both are contingent in nature. . . . If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one State to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow. It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State. An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an

§ 443. Correspondence Schools are Engaged in Interstate Commerce.

In *International Text Book Co. v. Pigg*,⁸³ decided in 1910, the court held that the conducting of a "correspondence school" is interstate commerce since it involves the solicitation of students in one State by local agents who are to collect and forward the fees, and systematic intercourse by correspondence between the company and its students, wherever situated, and also the interstate transportation of books, papers, etc. This mode of instruction, the court said, "involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus, and papers, useful or necessary in the particular course of study the scholar is pursuing, and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different States,—particularly when it is in execution of a valid contract between them,—is as much intercourse in the constitutional sense, as intercourse by means of the telegraph, . . . If intercourse between persons in different States by means of telegraphic messages conveying intelligence or information is commerce among the States, which no State may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case, we shall therefore assume that the business of the Text-book Company, by means of correspondence through the mails and otherwise between Kansas and Pennsylvania, was interstate in its nature."⁸⁴

§ 444. Doctrine that Writing of Insurance is Not Commerce Reaffirmed.

It was thought by some that the holding that lottery tickets were articles of commerce and that correspondence schools are engaged in inter-

express company for transportation. This in effect breaks down all the difference between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the States all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of State lines, and the creation of a centralized government."

⁸³ 217 U. S. 91.

⁸⁴ To the author it seems that the court was not justified in considering that the cases holding that telegraph and telephone companies are engaged in interstate commerce supported the decision in the instant case. In the telegraph and telephone cases it was the transmitting companies which were held to be engaged in commerce, and not the persons whose messages were transmitted. In the instant case the business was between the senders and receivers of the information,—the matter of the actual transportation or sending of this information was not involved.

state commerce increased the possibility that the court might reconsider its doctrine that the writing and selling of insurance policies is not commerce, and that their interstate transmission does not constitute interstate commerce. However, in 1913, the court in *New York Life Insurance Co. v. Deer Lodge County*,⁸⁵ reexamined the whole subject and reaffirmed its earlier holdings relating thereto. "If we consider these cases numerically," the court said, "the deliberation of their reasoning, and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of *stare decisis*." The court, however, proceeded to an analysis of these cases, and upheld the soundness with which the decisions rendered in them had been argued by the court. The fact that the use of the mails between the States was declared to be necessary to the centralization of the control and supervision of the details of the insurance business, was declared not material. That the insurance company was in one State and the purchasers of policies in other States was declared immaterial. The court said: "That they may live in different States and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one State to another."

§ 445. Advertising—Contracts for.

In *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*,⁸⁶ an action for triple damages brought under the Anti-Trust Act of 1890, was against the Curtis Company for the alleged attempt by it, to the injury of the Blumenstock Agency, to monopolize certain classes of advertising. The court dismissed the suit upon the ground that the actions complained of did not relate directly to interstate commerce, and, therefore, were not, whatever their character in other respects, within the purview of the act of Congress. The court said: "It may be conceded that the circulation and distribution of such publications [*Saturday Evening Post*, etc.] throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce. The case is wholly unlike *International Text-Book Co. v. Pigg* (217 U. S. 91) wherein there was a continuous interstate traffic in text-books and apparatus for a course of study pursued by means of correspondence. . . . This case is more nearly analogous to such cases as *Ficklen v. Taxing Dist.* (145 U. S. 1) wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and

⁸⁵ 231 U. S. 495.

⁸⁶ 252 U. S. 436.

non-resident merchants of goods situated in another State was not engaged in interstate commerce; and within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of interstate commerce."

§ 446. Bill Posting.

In *Charles A. Ramsay Co. v. Associated Bill Posters*⁸⁷ it was held that interstate commerce had been restrained and a monopolization thereof attempted by a combination of bill posters throughout the United States and Canada to monopolize the business within their respective localities. The court below had said: "The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that, after the posters have arrived at destination, the posting of them by the bill posters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578." The Supreme Court said:

"We cannot accept this view. The alleged combination is nation-wide; members of the association are bound by agreement to pursue a certain course of business designed and probably adequate materially to interfere with the free flow of commerce among the States and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States*, 171 U. S. 578, is not applicable. There the holding was that the rules, regulations and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding noncompetitive prices. The allegations clearly show the result has been as designed, that the statute has been violated and plaintiff's business has suffered."

§ 447. Refrigerator Car Companies.

By Section 209 (a) of the Transportation Act of 1920,⁸⁸ a "carrier," subject to the operation of the act, was defined to be "a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates," and, by a later clause, sleeping-car companies were expressly included. In *United States v. Interstate Commerce Commission*,⁸⁹ the

⁸⁷ 260 U. S. 501.

⁸⁸ 41 Stat. at L. 456.

⁸⁹ 265 U. S. 292.

question was whether this definition would include a company, not incorporated as a carrier, and owning no railway lines, but whose business was to manufacture, rent, and sell cars to railways. The company had filed no tariffs with the Interstate Commerce Commission, as interstate railway carriers were by law required to do, and had not kept their accounts according to the rules laid down by the Commission. During the War, however, the Director General of Railroads had taken over and used cars of the company and had paid compensation to the company therefor, and, at the expiration of Federal control, had surrendered the cars to the company. The Supreme Court held that these facts did not operate to stamp the company as a "carrier." The chief prior case relied upon was that of *Ellis v. Interstate Commerce Commission*,⁹⁰ in which it was held that the Armour Car Line which owned, manufactured and maintained refrigerator, tank and box cars and leased them to railroads or to shippers was not a common carrier within the purview of the Interstate Commerce Act. In that case the court had said of the company:

"It has no control over motive power or over the movement of the cars that it furnishes as above, and in short, notwithstanding some argument to the contrary, is not a common carrier subject to the act. It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private cars, etc., is to be affected by its control over the railroads that are subject to the act. The railroads may be made answerable for what they hire from the Armour Car Lines, if they would not be otherwise, but that does not affect the nature of the Armour Car Lines' itself."

§ 448. Electric Current.

In *Public Utilities Com. v. Attleboro Steam and Electric Co.*⁹¹ it was declared that the sale of electric current generated in one State to a purchaser in another State, with delivery at the State line, is interstate commerce.⁹²

§ 449. Driving Stolen Automobiles from One State to Another State.

By act of Congress of October 29, 1919,⁹³ known as the Dyer Act, it is

⁹⁰ 237 U. S. 434.

⁹¹ 273 U. S. 83.

⁹² The fact that the custody of and title to the current was passed at the State line, the continuity of the transmission of the current not being broken, was declared not to alter the essential interstate character of the transaction. Citing *People's Gas Co. v. Pub. Service Com.* (270 U. S. 550).

⁹³ 41 Stat. at L. 325.

provided that "whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5000, or by imprisonment of not more than five years, or both."

In *Whitaker v. Hitt*,⁹⁴ the Court of Appeals of the District of Columbia held that interstate commerce included the driving of an automobile under its own power across State lines, and, therefore, came within the prohibition of the act. The same was held in *Kelly v. United States*,⁹⁵ in which case it was held that an automobile is engaged in interstate commerce whether driven to another State for future sale or for the mere use of the purchaser.

§ 450. Driving Sheep across State Lines.

In *Kelley v. Rhoads*⁹⁶ the Supreme Court held that the driving of sheep from one State to another is an interstate commercial action,—that it is a proper mode of transportation,—and, therefore, that a State tax thereupon is an unconstitutional burden upon interstate commerce.

§ 451. Transportation of Women for Immoral Purposes.

In *United States v. Burch*⁹⁷ the court held that the transportation by automobile of a woman from one State to another for an immoral purpose was interstate commerce and within the constitutional power of Congress to regulate or punish as provided in the so-called Mann or White Slave Act. The court said: "Interstate commerce, then, is, among other things, the passage of persons from one State to another. It does not necessarily, or indeed at all, involve the idea of a common carrier, or the payment of freight or fare."

§ 452. Transportation of Goods by Private Automobile for Personal Use.

In *United States v. Simpson*,⁹⁸ the court held that interstate transportation by a person of intoxicating liquors for his own personal use and in his own automobile was interstate commerce, and, therefore, was within the purview of the act of Congress of March 3, 1917, known as the Reed Amendment.⁹⁹

In the *Hill* case—*United States v. Hill*,¹⁰⁰ the liquor was carried by a private individual, and for his own personal use, but it was transported across the State lines by a common carrier. Thus, though upon the person

⁹⁴ 285 Fed. 797.

⁹⁵ 277 Fed. 405.

⁹⁶ 188 U. S. 1. See also *Thornton v. United States* (271 U. S. 414).

⁹⁷ 226 Fed. 974.

⁹⁸ 252 U. S. 465.

⁹⁹ 39 Stat. at L. 1069.

¹⁰⁰ 248 U. S. 420.

of its owner, it was, in fact, transported by the common carrier, and, as such, it would seem to the author, might more easily be held to be a commodity of interstate commerce.¹⁰¹

§ 453. Buying and Selling as a Part of Interstate Commerce.

This subject is dealt with in a later section in which the business of Drummers and Peddlers, in its connection with interstate commerce, is considered.¹⁰²

§ 454. Mere Contracts between Persons in Different States Not Interstate Commerce.

The mere making of contracts between persons in different States does not constitute interstate commerce. In *Paul v. Virginia*,¹⁰³ the court, speaking of insurance contracts, said: "They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

As will later be seen in sections of the present work dealing with the matter of State taxation, and especially with reference to the status of drummers and stock and commodity brokers,¹⁰⁴ the test whether agreements to purchase or to sell are to be deemed constituent parts of interstate commercial transactions is as to whether interstate transportation of goods is necessarily involved in their execution.¹⁰⁵

¹⁰¹ Justices McReynolds and Clarke dissented in the case, but only upon the ground that the Reed Amendment made its prohibition dependent upon whether or not the State or Territory into which the liquor might be carried prohibited the manufacture or sale therein of intoxicating liquors for beverage purposes. In their dissent the Justices said: "Construed as forbidding this action because West Virginia had undertaken to forbid the manufacture and sale of intoxicants, the Reed Amendment, in no proper sense regulates interstate commerce, but is a direct intermeddling with the State's internal affairs. Whether regarded as reward or punishment for wisdom or folly in enacting limited prohibition, the amendment so construed, I think, goes beyond Federal power; and to hold otherwise opens possibilities for partial and sectional legislation which may destroy proper control of their own affairs by the several States. . . . The Webb-Kenyon Law, upheld in *Clark Distilling Co. v. Western Maryland R. Co.* (242 U. S. 311), is wholly different from the act here involved. It suspends as to intoxicants moving in interstate commerce, the rule of freedom from control by State action which the courts infer from Congressional silence or failure expressly to regulate."

¹⁰² See Chapter LX.

¹⁰³ 8 Wall. 168.

¹⁰⁴ *Post*, Chapter LX.

¹⁰⁵ See especially *New York ex rel. Reardon* (204 U. S. 152), and *Ware and Leland v. Mobile County* (209 U. S. 405).

§ 455. Transactions Preceding Shipment in Interstate Commerce.

It is elsewhere shown¹⁰⁶ that the power of the Federal Government to regulate interstate commerce includes the matter of selling and buying so far as those transactions are directly concerned with interstate commerce. So, also, its authority may be extended to prevent any sort of transactions, whether authorized by the States or the result of individual action, the effect of which is to impede the free course of interstate trade or to bring about results which Congress, in the exercise of its commercial powers, has forbidden. Thus, in *Pennsylvania R. Co. v. Clark Bros. C. M. Co.*,¹⁰⁷ with reference to an unjust discrimination by a railroad company in the matter of distributing cars to a coal mining company, where the coal, though sold f. o. b. cars at the mine, was to be transported to another State. The court said: "Mere billing or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and provisions of the act to regulate commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply."

Summing up earlier decisions, the court, in *Dahnke-Walker Milling Co. v. Bondurant*,¹⁰⁸ said: "Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported to another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original package. On the same principle, where goods are purchased in one State for transportation to another, the commerce includes the purchase quite as much as it does the transportation." ¹⁰⁹

In this case it was held that a corporation of one State might go into another State, without its leave or hindrance, for all legitimate purposes of interstate commerce, and that the purchase of wheat in one State for delivery on board cars at a point in that State was interstate commerce where the buyer in continuance of its earlier practice was purchasing the grain for shipment to its mill in another State.

In *Pennsylvania R. R. Co. v. Sonman Shaft Coal Co.*¹¹⁰ it was held that the sale and delivery of coal f. o. b. cars at the mine for transportation to purchasers in other States is interstate commerce—the cars being furnished

¹⁰⁶ See § 453.

¹⁰⁷ 238 U. S. 456.

¹⁰⁸ 257 U. S. 282.

¹⁰⁹ Citing *Brown v. Maryland* (12 Wh. 419); *Am. Steel & Wire Co. v. Speed* (192 U. S. 500); *Am. Express Co. v. Iowa* (196 U. S. 133); *Walton v. Missouri* (91 U. S. 275); *Kidd v. Pearson* (128 U. S. 1); *United States v. E. C. Knight Co.* (156 U. S. 1); *Addyston Pipe & Steel Co. v. United States* (175 U. S. 211).

¹¹⁰ 242 U. S. 120.

not for holding or storing coal but, as understood by both the coal company and the railroad, for immediate employment in interstate transportation. "It is plain," said the court, "that supplying the requisite cars was one essential step in the intended movement of the coal and a part of the commerce—whether interstate or intrastate—to which that movement belonged." ¹¹¹

In *Shafer v. Farmers' Grain Co.*¹¹² the court held that a State act prohibiting the buying of wheat by grade, without the buyer having obtained a State grading licence, and making other requirements with regard to such buying, was an unconstitutional interference with interstate commerce. With regard to the inclusion within interstate commerce of the buying for transportation in such commerce, the court said: "Buying for shipment, and shipping to markets in other States, when conducted as before shown, constitutes interstate commerce; the buying being as much a part of it as the shipping." ¹¹³

By Part B of the Agricultural Appropriation Act of August 11, 1916,¹¹⁴ Congress put into force provisions for the regulation of the buying of grain for interstate or foreign shipment. By this act official grain standards were established and interstate and foreign shipments were forbidden unless the grain should have been previously inspected and found to conform to the standards thus established. In *Lemke v. Farmers' Grain Co.*¹¹⁵ the constitutionality of the act was upheld, and a State law declared invalid which sought to impose regulations within the same field. The State act, the court said, showed a comprehensive scheme to regulate the buying of grain to be shipped in interstate commerce. That this was a regulation of interstate commerce, the court declared to be obvious. "Nor," the court said, "will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce." ¹¹⁶

Cases like the instant one, the court said, could not be determined upon the basis of decisions with reference to the right of State taxation, or the control of manufacture or intrastate commerce. "In those cases we have defined the beginning of interstate commerce as that time when

¹¹¹ See also *Pennsylvania R. R. Co. v. Clark Bros. Coal Mining Co.* (238 U. S. 456), in which the court said: "The movement thus initiated is an interstate movement and the facilities required are facilities of interstate commerce." Cf. also *United States v. Berwind-White Coal Co.* (274 U. S. 564).

¹¹² 268 U. S. 189.

¹¹³ Citing *Lemke v. Farmers' Grain Co.* (258 U. S. 50); *Stafford v. Wallace* (258 U. S. 495); *Binderup v. Pathé Exchange* (263 U. S. 291).

¹¹⁴ 39 Stat. at L. 482. This part of the Appropriation Act is known as the "United States Grain Standards Act."

¹¹⁵ 258 U. S. 50.

¹¹⁶ Citing *Pennsylvania R. Co. v. Clark Bros. Coal Mining Co.* (238 U. S. 456).

goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond State authority into the domain of Federal control. . . . None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond State lines. It is true, as appellants contend, that, after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market [i. e., outside the State]. That was the course of business, and fixed and determined the interstate character of the transactions." ¹¹⁷

§ 456. Selling as a Part of Interstate Commerce.

This subject is later dealt with in connection with the Original Package doctrine.¹¹⁸

§ 457. Commerce Does Not Include the Production of the Commodities Transported.

In a series of most important decisions it has been held that commerce does not begin until the goods intended for purchase, sale, or exchange in another State have begun their trip thither. That is to say, they must at least have been placed in the hands of the agents who are to transport them. The mere fact that goods are manufactured to be transported and sold in another or other States, or that they have been segregated in the place where produced, for that purpose, is not sufficient to make them articles of interstate commerce. In some way they must have advanced some distance upon their way outside of the State of production. It is clear, therefore, that the whole process of manufacture or production is definitely excluded from the operation of the commerce clause. "Commerce succeeds to manufacture, and is not a part of it." ¹¹⁹

¹¹⁷ Citing *Swift v. United States* (196 U. S. 375); *Eureka Pipe Line Co. v. Hallanan* (257 U. S. 265); *United Fuel Gas Co. v. Hallanan* (257 U. S. 277).

¹¹⁸ See § 456.

¹¹⁹ *U. S. v. E. C. Knight Co.* (156 U. S. 1). In *Kidd v. Pearson* (128 U. S. 1), the court said: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the

This subject will receive especial treatment in Chapter XLVI in which will be considered the extent of the legislative powers of the Federal Government under the commerce clause and, especially, the discussions arising under the Anti-Trust Act of 1890.

§ 458. Intent to Export Not Controlling.

The fact that goods are manufactured for export does not render their manufacture an element in the interstate or foreign commercial transaction.

This principle was clearly laid down in *Coe v. Errol*.¹²⁰ In this case the court held that certain logs cut in New Hampshire and hauled to a river town for transportation to the State of Maine, but not yet actually started upon their final way to that State, had not become articles of interstate commerce. The court said: "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them [as articles of interstate commerce] from State taxation? . . . There must be a point of time when they ceased to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin, to that of their destination." ¹²¹

However, in *Sprout v. City of South Bend* ¹²² it was held that "the destination intended by the passenger [on a motor bus] when he begins his journey and known to the carrier, determines the character of the commerce."

In this case, the carrier, who claimed to be engaged wholly in interstate commerce, in fact received passengers who, though required to purchase tickets to points outside the State of departure, in fact were discharged within the State. This device, said the court, did not change the legal character of the service. The actual facts of the case, the court declared, must govern.

States, with the power to regulate not only manufactures but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management."

¹²⁰ 116 U. S. 517. See also *Crescent Cotton Oil Co. v. Mississippi* (257 U. S. 129).

¹²¹ Cf. *Eureka Pipe Line Co. v. Hallanan* (257 U. S. 265), and *Dahnke-Walker Milling Co. v. Bondurant* (257 U. S. 282).

¹²² 277 U. S. 163.

§ 459. Interstate Commerce Does Not Terminate until the Delivery and Sale or Commingling of the Imported Goods with the Goods of the State.

It has been seen that interstate commerce does not begin until, by some definite act, the goods have started upon their trip outside the State of origin. As to the termination of interstate transportation it has been established that this does not occur until the goods transported have reached their destination, been delivered, and either sold or taken out of their original packages in which shipped and commingled with the other goods of the State. The discussion of this proposition will be found in Chapter LV under the heading of "The Original Package Doctrine."

CHAPTER XLIV

FEDERAL REGULATION OF COMMERCE

In the preceding chapter the meaning of the term "Interstate and Foreign Commerce," as constitutionally determined, was considered. In the present chapter we shall deal with the meaning of the term "to regulate" as employed in the Commerce Clause; with the question as to the exclusiveness of the Federal commerce power; and with the manner in which Congress has exercised or sought to exercise this power.

§ 460. Extent of the Regulating Power of Congress over Interstate Commerce.

There is no question but that Congress has a comprehensive power to regulate, according to its discretion,¹ every phase and feature of interstate commerce. It is, however, to be observed that this does not vest in Congress the right to regulate all acts or activities of persons, whether pertaining to interstate or not, because of the fact that they are engaged in interstate commerce. This doctrine was emphatically declared in *Howard v. Illinois Central R. Co.*² in which the Federal Employers' Liability Act of 1906³ was held invalid because not limited in its application to employees of carrier companies while engaged in interstate as distinguished from intrastate commerce. The court, after pointing out that the issue whether a company or corporation, by engaging in interstate commerce, renders itself subject in all its operations to Federal regulation, said: "To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that, if the contention were well founded, it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all

¹ Provided, of course, it does not violate other provisions of the Constitution, as for example those relating to due process of law, preference of ports, etc.

² 207 U. S. 463; 52 L. ed. 297.

³ 34 Stat. at L. 232.

the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

§ 461. Regulation Defined.

In the sections which follow it will be found that, by successive interpretations, the Supreme Court has given a very broad meaning to the power vested in Congress to "regulate" interstate and foreign commerce, so that it is made to include not only almost every possible phase of the actual transportation of goods and commodities, but, not to mention other subjects, the relation of carriers to their employees, so far as these can be deemed to have any effect upon that actual transportation, the fixing of the charges, maxima and minima, that may be made for transportation, to the prohibition of discriminatory practices, the consolidation or non-consolidation of railways, the common use of terminal facilities, the exclusion of commodities from transportation, the provision by the United States Government itself of transportation facilities, the issuance of securities by private companies, and even the "recapture" of earnings of these companies in excess of a fair return upon their properties. In discussing the constitutionality of these various modes of regulation, the language of courts in construing the term "regulation" will be quoted, and it will be sufficient here to give but one of the most recent and most comprehensive of them. In *Dayton-Goose Creek Ry. Co. v. United States*⁴ was involved the constitutionality of the so-called "recapture" paragraphs of the Transportation Act of 1920⁵ according to which incomes earned by railways in excess of a fair return are to be held by them as trustees for the United States, one-half of such excess to be paid into a reserve fund to be maintained by the railway, and the other half into a general revolving fund to be maintained by the Interstate Commerce Commission. After referring to two earlier cases in which the act had been considered,⁶ the court said: "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its

⁴ 263 U. S. 456.

⁵ Chapter 91, 422, 41 Stat. at L. 456.

⁶ *Wis. R. R. Commission v. C., B. & Q. Ry.* (257 U. S. 563); *New England Divisions Case* (261 U. S. 184).

safety." After citing cases in support of the proposition that, if it desires to do so, the United States may, under its commerce power, itself construct and operate or authorize others to construct and operate national highways, bridges from State to State, and other instrumentalities for carrying on interstate commerce, the Chief Justice said: "If Congress may build railroads under the Commerce Clause, it may certainly exert affirmative control over privately owned railroads, to see that such railroads are equipped to perform, and do perform, the requisite public service."

It is thus seen that the regulatory power of Congress over interstate commerce may be exercised not only with a view to the interests of those parties directly engaging in it in specific instances, but with regard to the general interests of the public as a whole, and that, therefore, the regulations prescribed may relate to the railways as a whole and have for their aim the maintenance of a general system of or of general systems of transportation which will best serve the interests of the entire people of the United States.⁷

§ 462. Federal Commerce Power Plenary in Character.

The control of interstate and foreign commerce being granted to the Federal Government without limitation, the grant is, according to the general principle governing the interpretation of grants of Federal power, construed to be plenary. This was stated in absolute terms by Marshall in *Gibbons v. Ogden*,⁸ and has never been questioned. "This power," said the Chief Justice, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."⁹

⁷ This feature of regulation first found expression in the Transportation Act of 1920 and was shown not only in the "recapture" provisions of that act but in the provision regarding the division of joint rates. For a consideration of this act see *post*, §§ 524, 531.

⁸ 9 Wh. 1.

⁹ In *Champion v. Ames* (188 U. S. 321) the court, after a review of adjudged cases, said: "The cases cited . . . show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions in the exercise of power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to the utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it;

§ 463. Exclusiveness of Federal Control over Interstate Commerce.¹⁰

The Federal authority over interstate commerce is not in terms made exclusive, and the courts have at times varied their views as to the extent to which an exclusiveness is to be deemed implied. From the beginning the States acted upon the assumption that they were not deprived of power to grant to persons and corporations exclusive privileges with reference to the carrying on upon land of commerce between themselves and other States; and this practice was acquiesced in by the Federal Government. As to the carrying on of interstate commerce by water, however, it seems to have been more generally held that the Federal jurisdiction was exclusive. This, however, was not judicially determined until the decision of the great case of *Gibbons v. Ogden*.¹¹

§ 464. *Gibbons v. Ogden*.

In this case it was held that the grant by the State of New York to an individual of an exclusive right to navigate its waters with steam vessels had no constitutional validity in so far as interstate or foreign commerce was affected. In support of this judgment, Marshall, in his opinion, laid down in general terms the doctrine that, by the Commerce Clause, the Federal Government is granted an exclusive control of commerce between the States, and with foreign countries, and that, therefore, it is beyond the constitutional power of the States to grant, or to withhold, interstate or foreign commercial privileges.

In support of the doctrine that the grant to the Federal Government of the power to regulate interstate and foreign commerce did not exclude the States from a regulative power within the same field, it was argued by the counsel that this was the accepted doctrine with reference to the taxing power. As to this, Marshall, however, replied: "Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an

and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because in their opinion, such regulations may not be the best or most effective that could be employed."

¹⁰ For an article tracing in an especially scholarly manner the development of the doctrine of the relation of Federal to State control of commerce, see 28 *Harvard Law Review*, 34, "The Evolution of Federal Regulation of Intrastate Rates" by W. C. Coleman.

¹¹ 9 Wh. 1.

exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

As to the enactment by the States of quarantine, health, and inspection laws, the validity of which had not been questioned, Marshall pointed out that these fall within the police powers of the States and do not evidence the possession by them of regulative authority over interstate and foreign commerce.

The precise point actually decided in *Gibbons v. Ogden* was that the Federal authority over foreign and interstate commerce is exclusive in so far as that commerce is carried on by water. Interstate commerce upon land was not involved, and it would appear that general contemporaneous construction of the case limited its operation to commerce by water.¹²

To a certain degree, also, the doctrine laid down by Marshall was *obiter* in that it was held that the State action which was complained of was in violation of existing acts of Congress, and, therefore, was void whether the Federal power over interstate commerce was held exclusive or only concurrent. But, however this may be, the language of Marshall, and that of Justice Johnson in a concurring opinion, is much broader, and the case has since come to be the leading authority cited in support of the principle that the States may not in any manner directly interfere with, or attempt the regulation of, commerce between the States by whatever agency that commerce may be carried on.¹³

¹² This is quite clearly shown by Mr. Prentice. "There was nothing new," says Prentice, "in the establishment of the rule which to most modern readers seems the great achievement of the case, that Federal power over commerce is exclusive. To the extent under consideration, it had always been so regarded. . . . That the Federal power was exclusive seems, . . . as the subject was then regarded, to have had little relation to monopolies of transportation, and no relation whatever to land transportation and ferriage." *Federal Control over Carriers and Corporations*, p. 68.

¹³ Justice Johnson, in a concurring opinion, argued that the judgment of the court should be based upon an emphatic statement of the exclusiveness of the Federal authority over commerce. He said: "The power of a sovereign State over commerce . . . amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside in but one potentate; hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."

A review of the cases which followed *Gibbons v. Ogden* will show, however, that the doctrine of the Supreme Court as to the exclusiveness of Federal authority over commerce has not been a uniform one. Without abandoning the doctrine that the States are constitutionally disqualified from directly interfering with the regulation of commerce, the Supreme Court has at times upheld State acts which have in fact amounted to substantial interferences with interstate and foreign commerce. And, indeed, the language of the court, and even of Marshall himself in certain cases, has implied the adoption of the doctrine that the constitutionality of a State law in regulation of, or interfering with, the freedom of interstate and foreign commerce is to be tested rather by the existence of a conflicting Federal statute, than by the exclusiveness of the Federal jurisdiction.

In *Brown v. Maryland*,¹⁴ decided three years after *Gibbons v. Ogden*, the court held void an act of a State requiring importers of foreign goods and persons selling the same to take out a license for which they were to pay fifty dollars. The act was held void not only as in violation of the constitutional provision forbidding the States to levy duties on imports, but as repugnant to the Commerce Clause, and also in conflict with the acts of Congress authorizing importation. Strictly speaking, therefore, the case did not necessarily involve the question of the exclusiveness of the Federal power over interstate and foreign commerce. In the opinion which Marshall rendered that doctrine appears, however, to be accepted. "Any charge," he says, "on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce." And again, "We cannot admit that [the States' power of taxation] may be used so as to obstruct the free course of a power given to Congress."¹⁵

In *Wilson v. Blackbird Creek Co.*,¹⁶ decided in 1829, we find a much less strict interpretation of the exclusiveness of the Federal commercial power. In this case was upheld a State law authorizing the construction of a dam on a navigable stream. It being contended that navigation and, therefore, commerce was interfered with, Marshall, apparently accepting a doctrine of concurrent power, held that inasmuch as Congress had not legislated upon the subject, the law authorizing the dam was valid. He said: "If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over these small navigable creeks into which the tide flows, we should not feel much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act." And, later on: "We do not think that the act can, under all circum-

¹⁴ 12 Wh. 419.

¹⁵ A dissenting opinion was filed by Justice Thompson.

¹⁶ 2 Pet. 245.

stances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, as being in conflict with any law on the subject."

It is difficult to harmonize this language with that used only a few years before in *Gibbons v. Ogden* and *Brown v. Maryland*, or, indeed, with that employed in cases decided a few years later. Neither in the *Blackbird Creek* case itself nor in the later cases did Marshall indicate that he intended, or had intended, to declare a doctrine different from that earlier asserted. It would seem, therefore, that, though not so expressed, Marshall held that the damming of the creek, the purpose of which was to reclaim certain marsh lands was a legitimate exercise by the State of a police power which, in the absence of express congressional prohibition, might be justified even though navigation were to some extent affected.

§ 465. *New York v. Miln.*

In *New York v. Miln*,¹⁷ decided in 1837, the relation of the States' police powers to the regulation of commerce was carefully considered. In this case a State law was upheld which required masters of all vessels arriving at the port of New York to make certain reports as to passengers carried, and imposed certain penalties in case this was not done. The opinion of the court was rendered by Justice Barbour. In this opinion it was declared that, "We shall not enter into any examination of the question whether the power to regulate commerce be or be not exclusive of the States, because the opinion which we have formed renders it unnecessary, in other words we are of opinion that the act is not a regulation of commerce, but of police, and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the States." This police power was, however, so broadly defined, as in effect to give to the States a concurrent power of legislating with reference to matters subject to Federal legislation. "Whilst a State is acting within the legitimate scope of its powers as to the end to be attained," the opinion declared, "it may use whatever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power, subject only, to this limitation, that in the event of collision the law of the State must yield to the law of Congress. . . . Even then, if the section of the act [of the State] in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision [with an act of Congress] exist."

From this language it is apparent that the test as to the validity of the State law is not as to the exclusiveness of the Federal authority, but as to

¹⁷ 11 Pet. 102.

the existence of a countervailing act of Congress. In other words, the concurrent theory is, to this extent, adopted.

In a dissenting opinion Justice Story argued strongly for the unconstitutionality of the State law and the exclusiveness of the Federal authority and asserted that Marshall, before whom the case was first argued, had been in agreement with him. The existence of police powers in the States he admitted, but not that these powers might ever be used for the regulation of matters placed within the exclusive jurisdiction of the United States. "A State," he declared, "cannot make a regulation of commerce to enforce its health laws, because it is a means withdrawn from its authority. It may be admitted that it is a means adopted to the end, but it is quite a different question whether it be a means within the competency of the State jurisdiction."

§ 466. License Cases.

The next important construction of the extent of the Federal authority over commerce was that given in the group of cases known as the License cases,¹⁸ decided in 1846. These cases involved State laws fixing conditions of, and requiring licenses for, the sale of certain goods imported from other States. The justices, though unanimous in upholding the State laws, were divided as to the grounds upon which their validity should be rested. By several the concurrent theory was relied upon; by others the police power of the States; while, in some cases, both of these grounds were advanced. There was not, however, a majority of the court in support of either one of these positions. It is remarkable, however, that no dissenting opinion was filed in advocacy of the exclusive power of the Federal Government.

The concurrent theory was most clearly and definitely stated by Taney in his opinion. He said: "The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress." One clause of this sentence seems to indicate the police power as a source of authority for these State commercial regulations; but later on the necessity of resorting to this source of authority is expressly repudiated. The State's authority, to make regulations of commerce, he says, "is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to

¹⁸ 5 How. 504.

have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the States from pestilence and disease, or to make regulations of commerce for the interest and convenience of trade." However, as has been said, several of the concurring justices were not in agreement with the chief justice upon this point, and found the source of the power of the States to enact the laws in question to be their police powers rather than a concurrent authority to legislate with reference to matters of interstate and foreign commerce.

The position taken by Justice Woodbury is especially worthy of attention, in that it was one which had earlier been suggested by Daniel Webster in an argument in *Gibbons v. Ogden*, and which approximates the one that has since obtained general acceptance by the court. This is, that the Federal power over commerce is exclusive in so far as, from the nature of the case, a uniform regulation is demanded or is appropriate; but that in matters of purely local and particular interest the States may, in the absence of opposing Federal statutes, legislate. "I admit," he said, "that, so far as regards the uniformity of a regulation reaching to all the States, it must in these cases, of course, be exclusive. . . . But there is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it."

§ 467. Passenger Cases.

Two years after the License cases, the court was again called upon, in the so-called Passenger cases,¹⁹ to consider the regulative powers of the States with reference to foreign and interstate commerce. Here there was a departure from the doctrine of *New York v. Miln*, a law of New York being held void which authorized the State health commissioners to collect certain fees from captains of ships arriving at the ports of the State; and a law of Massachusetts annulled which required captains of ships to give certain bonds as to immigrants landed, and which provided for the payment of a small sum by each immigrant.

In these Passenger cases, as in the License cases, no opinion representing that of a majority of the court was rendered, the justices preparing individual arguments in support of their several positions. Justice McLean asserted emphatically the exclusiveness of the Federal jurisdiction. Justice Wayne agreed as to this, but said that it was not necessary to argue it in the cases at bar. The three other justices, concurring in the judgment that the laws in question were in violation of existing Federal laws and treaties, did not commit themselves upon the question of the exclusiveness of the Federal power. Chief Justice Taney in a dissenting opinion

¹⁹ 7 How. 283.

argued that the State laws were valid as a proper exercise of the States' police power. Justice Woodbury, also dissenting, reaffirmed the doctrine declared by him in the License cases, and held the laws valid as local in nature and operation.

§ 468. *Cooley v. Port Wardens.*

In *Cooley v. Port Wardens*,²⁰ decided in 1851, the Supreme Court, three justices dissenting, accepted the principle that had been suggested by Webster and approved by Justice Woodbury, and upheld a pilotage law of Pennsylvania on the ground that, though it was a regulation of commerce, it was with reference to a matter properly lending itself to local State control, and one for the regulation of which Congress had not legislated. Justice Curtis, delivering the opinion of the court, said: "When the nature of a power like this [the commerce power] is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say that they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature, some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable to but a part. . . . It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots."²¹

The doctrine of *Cooley v. Port Wardens* is, at the present time, the accepted doctrine of the Supreme Court. In *Bowman v. R. R. Co.*²² the doctrine was declared to be firmly established.²³

²⁰ 12 How. 299.

²¹ Justice McLean, in a dissenting opinion, restated his doctrine of the exclusiveness of the Federal power, including such matters of local regulation as that of pilotage. Justice Daniel, though concurring in the judgment rendered, declared that he did so because this was a matter which the States had never surrendered to the Federal Government, and which was not implied in the commercial power which had been granted to that government.

²² 125 U. S. 465.

²³ "The doctrine now firmly established is that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, or improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly

§ 469. Supremacy of Federal Commerce Power Again Examined in the Minnesota Rate Cases.

In the Minnesota Rate cases—*Simpson v. Shepard*²⁴ decided in 1913, the court again found it necessary to review with care the relation between the interstate commerce power of the Federal Government and the legislative powers of the States. In that case, which is elsewhere discussed with reference to the power of Congress to control intrastate railway rates as incidental to its power to control interstate railway rates, the court pointed out that, assuming that the rates which had been fixed by the State were reasonable, so far as intrastate traffic was concerned, they could be disturbed by Federal authority only if they operated as a direct burden upon interstate commerce, or if they were in conflict with a valid law of Congress. The court said: "These grounds are distinct. If a State enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which, in the absence of Federal regulation, should be free. . . . On the other hand, if the State, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted. . . . The power of Congress to regulate commerce among the several States is supreme and plenary. . . . There is no room in our scheme of Government for the assertion of State power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on: and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. . . . It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity

regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but when the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free."

²⁴ 230 U. S. 352.

of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation.”²⁵

§ 470. Exclusiveness of Federal Legislation Often a Matter of Statutory Construction.

The question whether State laws which affect interstate commerce, without directly burdening it, are to be deemed constitutional, has, in a good many cases, been decided by the Supreme Court as a matter of statutory construction, that is, whether Congress has or has not, by its enactment, evinced an intention so fully to cover the fields to which they relate that no constitutional opportunity is left to the States to enter these fields, even, it may be, to supplement the Federal provisions, and not to authorize measures that are inconsistent with them. The question whether or not Congress has intended to prevent concurrent or ancillary legislation upon the part of the States will be specifically considered in connection with examination of the various acts which Congress has enacted under its commerce powers.

§ 471. Federal Incorporation of Companies for the Promotion or Carrying on of Interstate Commerce.²⁶

The Federal Government has the undoubted power itself to own and operate, or to incorporate, companies for the construction and operation of roads, bridges, and other instrumentalities of interstate commerce.²⁷ This authority is derived not only from the Commerce Clause, but from the authority of the Federal Government to establish post-offices and post-roads, and from its military powers. And, incidental to the exercise of these powers, the right of eminent domain may be exercised by the Federal Government or by corporations chartered by it, within the States and Territories.²⁸

²⁵ Citing *Cooley v. Port Wardens* (12 How. 299), and other later cases. For further discussion of the *Minnesota Rate* cases see *post*, § 616.

²⁶ On the general constitutional power of Congress to incorporate companies, see the series of articles by Myron W. Watkins, entitled “Federal Incorporation” in 17 *Michigan Law Review*, 64, 145, 238; and the article entitled “The Powers of Corporations Created by Act of Congress” by E. Q. Keasbey, in 32 *Harvard Law Review*, 689.

On the power of Congress to incorporate companies derived from the Commerce Clause, see the article “Federal Incorporation of Railway Companies” by C. W. Bunn in 30 *Harvard Law Review*, 589; and the article “Federal Power to Own and Operate Railways in Peace Time” by J. A. Fowler, in 33 *Harvard Law Review*, 775.

²⁷ *California v. Central Pacific Ry. Co.* (127 U. S. 1); *Monongahela Navigation Co. v. United States* (148 U. S. 312); *Luxton v. North River Bridge Co.* (153 U. S. 525).

²⁸ *Kohl v. United States* (91 U. S. 367); *Cherokee Nation v. Kansas Ry.* (135 U. S. 641).

In *California v. Central Pacific Ry. Co.*,²⁹ the court, after reviewing legislative and judicial precedents, said: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for the postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce." This language is quoted with approval in *Luxton v. North River Bridge Co.*³⁰

In *Wilson v. Shaw* ³¹ the authority of the United States to construct the interoceanic canal across the territory ceded by the Republic of Panama, was declared.

Whether or not the United States may incorporate companies to do an interstate selling or shipping business is not so certain, as the exercise of the power has never been attempted, and has not, therefore, been subjected to judicial examination. Inasmuch, however, as it is established that interstate and foreign commerce includes the buying and selling of the commodities transported in such commerce, as well as the contracts relating thereto, it would seem extremely likely that the Federal right to charter companies to carry on these phases or branches of interstate and foreign commerce would, if exercised, be upheld by the courts.

In connection with this question of Federal incorporation several ancillary questions of great interest suggest themselves. These are: (1) whether a Federally chartered carrier company may be granted also the right to do an intrastate carrier or manufacturing business; (2) whether a Federally chartered jobbing or shipping corporation may be granted the right to do an intrastate jobbing or shipping and selling business, or to manufacture the commodities which it sells or ships; (3) whether a company may be Federally chartered to manufacture goods for export to other States or to foreign countries: and, if so, whether it may incidentally be authorized to sell its products within the State where manufactured; (4) whether persons and companies may be denied the right to engage in interstate and foreign commerce unless they have obtained Federal licenses or charters; and (5) finally, whether the persons or corporations thus licensed or chartered may be subjected to Federal control with reference to all branches of their business,—those not relating to interstate commerce as well as those so relating.

That the courts will recognize that a corporation Federally chartered to do an interstate carrier business may also be granted the incidental author-

²⁹ 127 U. S. 1.

³⁰ 153 U. S. 525.

³¹ 204 U. S. 24.

ity to do an intrastate carrier business is highly probable, for the reason that the two kinds of transportation are so closely connected that, as was held with reference to the doing of a Federal banking business in connection with the performance of their Federal functions, it is not feasible to separate the two. The doctrine laid down in *Southern Ry. Co. v. United States* ³² and the inseparable relation between interstate and domestic commerce recognized in the *Minnesota Rate* cases, and *W. U. Tel. Co. v. Kansas* ³³ go very far towards supporting this view.

More doubtful than the question just considered is the one whether a Federally chartered interstate carrier may be granted the incidental right to manufacture the commodities, or certain of them, which it transports. Here, as a practical proposition, it is impossible to show that there is a connection between the producing and the transporting of commodities so intimate that the two may not be separated, and independently conducted. That the two are distinct has been repeatedly declared by the Supreme Court ³⁴ and, indeed, Congress has by law, as is well known, forbidden interstate carriers to transport commodities which they have themselves manufactured.

Whether or not a Federal corporation chartered to engage in interstate commerce as a shipper or seller may be incidentally granted authority to ship and sell or to manufacture within the several States depends upon the same conditions which have been discussed with reference to carriers. If the courts should find that, in fact, it is not practicable to dissociate the two, they will hold that the constitutionality of the primary power will carry with it that of the incidental authority.

However, it seems reasonably certain that the courts cannot, without departing from earlier doctrines, sustain the power of Congress to incorporate companies empowered to manufacture goods within the States, and to sell them outside the States of manufacture, for, in such case, the primary purpose would be the manufacturing, and the incidental purpose the transportation. But the Federal Government is conceded to have no direct authority to regulate manufacturing within the State. Such power, which it has within this field, can only be upheld, if upheld at all, as necessarily incidental to the exercise of the power to regulate interstate commerce.

It was argued by Mr. Garfield, when Commissioner of Corporations, that Congress might grant charters to manufacturing companies whose only connection with interstate commerce would be that their products would become articles of interstate commerce, the reasoning being that though, as established by the *Knight* case, the production of goods in-

³² 222 U. S. 20.

³³ 216 U. S. 1.

³⁴ *Coe v. Errol* (116 U. S. 517); *Kidd v. Pearson* (128 U. S. 1); *United States v. E. C. Knight Co.* (156 U. S. 1).

tended for interstate commerce, has no direct connection with and does not imply interstate commerce, it does not follow that interstate commerce does not imply production. "On the contrary, it is submitted," declared Commissioner Garfield, "that it does imply production to such an extent that the power to produce is a necessary constitutional incident of the powers of such proposed interstate commerce corporations. Production is an indispensable prerequisite of commerce, whether interstate or otherwise. Production may exist without commerce, certainly without a specified form of commerce, such as interstate commerce. . . . On the other hand interstate commerce cannot exist without production. . . . All the powers for the transaction of commerce might be granted by Federal franchise, and yet they would be wholly null, valueless, and inoperative unless there were also means of bringing into existence the subjects upon which such powers shall act." This being taken as established, Mr. Garfield had no difficulty in declaring that the States would be without the constitutional power to prohibit or interfere with production by such companies.

Certainly this reasoning is not convincing. Upon the same ground it might be argued that because paper and ink, pencils and pen, are necessary for the writing of letters, and letters necessary if there is to be first-class mail matter, the Federal control could be extended over the manufacturing of such commodities.

The status of the National Banks furnishes no support for Mr. Garfield's position. The efficiency of interstate carrier companies, as transportation agencies, is wholly independent of the conditions under which, or the persons or corporations by which, the goods which they carry are produced. Of course, if no goods are produced there will be no interstate transportation. But, this will be so because there will be no need for such transportation. Goods are not produced in order that commerce may exist. Commerce, in short, is not an end in itself.

According to Mr. Garfield's argument which treats commerce as an end in itself it might be argued that the production of commodities should be increased not so that a need for them as articles of consumption could be satisfied, but simply and solely to supply larger trainloads for the interstate carrier companies. The absurdity of this is manifest.

The cases of *Swift v. United States*³⁵ and *Loewe v. Lawler*³⁶ are not authority for the proposition that the United States may incorporate manufacturing companies. They go no further than to hold that combinations between manufacturers or buyers, or between individuals, to prevent or restrain the free competitive sending and selling of commodities among the States is an interference with interstate commerce.³⁷ This is

³⁵ 196 U. S. 375.

³⁶ 208 U. S. 274.

³⁷ Cf. Goodnow, *Social Reform and the Constitution*, pp. 124-126.

a very different doctrine from that which declares that manufacturing itself is, or may be, incidentally a part of interstate commerce. It is established that manufacturing is not *per se* commerce, and is not, therefore, subject to direct Federal regulation. It is therefore only when manufacturers or employees go beyond the mere fact of manufacturing, and, by combinations or otherwise, attempt directly to restrain or control the interstate transportation and sale of their products, that Federal interference is constitutionally justified. Should the Federal Government incorporate a company and authorize it to do a manufacturing business within the States, or should it in any other way impose a direct regulation upon manufacturing within the States, it would enter a field absolutely beyond its constitutional sphere. That interstate commerce is greatly affected by the conditions under which manufacturing is carried on, is, of course, true: and that the States, by the regulation of manufacturing within their limits, whether by foreign or domestic corporations, may indirectly encourage or discourage the production of the commodities which are to furnish the articles of interstate commerce, is equally true. But this furnishes no argument for the doctrine that Congress may, for the promotion of interstate commerce, undertake the control of manufacturing within the States. For in truth, it would not be difficult to show that interstate commerce is substantially affected by almost every element of the social, economic and industrial life of the people,—by the men who mine the coal which is used by interstate railways and steamships, by the persons who produce the material of which the cars and locomotives and ships are built, by the bankers and brokers who deal in the stocks and bonds of interstate carrier companies, and, in fact, by the operation of all who in any way deal with or handle the commodities which ultimately are transported outside the State. That commodities are manufactured with the intent that they are to be exported, in part or in whole, is absolutely immaterial, as determining the exclusiveness of State authority over their production.³⁸ It is only when the States go beyond this and attempt to regulate or in any way restrain their exportation that they exceed their constitutional competence.³⁹

But, it is said, if legislative control over manufacturing carried on for the sake of interstate and foreign commerce be allowed to remain with the States, the development of these forms of commerce will be most seriously hampered. This, however, is an argument rather against the policy of division of powers between the States and the Federal Government, than in favor of the constitutionality of Federal control.

If it be conceded that the Federal Government has the constitutional power to license persons or charter corporations to engage in interstate

³⁸ *Coe v. Errol* (116 U. S. 517).

³⁹ *West v. Kansas Natural Gas Co.* (221 U. S. 229).

and foreign commerce, that is, if it be admitted that this is one of the forms which the power to regulate this commerce may legitimately take, there still remains the question whether it can be provided in such licenses or charters that the persons or corporations affected shall be subject to Federal regulation with reference to all branches of their business, whether concerned with interstate commerce or not. If it should be held that the right to engage in such commerce owes its very existence to congressional recognition, express or implied, the requirement in question would be valid so far as any private rights of individuals would be concerned. But it would not meet the difficulty that, if we are to be guided by the analogous doctrine laid down with reference to the States, the Federal Government may not thus obtain a jurisdiction within a field which is constitutionally excluded from its sphere of control. That authority over activities not of an interstate commerce character does not follow from the fact that the persons or corporations engaged in them are also doing an interstate commerce business, was emphatically stated by the court in the *Employers' Liability* case.⁴⁰

It is established that the fact that a railway company is organized under a Federal charter does not necessarily, that is, without congressional provision to that effect, exempt it from the same regulative control by the States as that to which State-chartered companies are subject. This doctrine is stated in *Reagan v. Trust Co.*,⁴¹ the court pointing out that it is to be presumed that Congress will expressly provide for those cases in which the interest of the nation, and the discharge of Federal duties, if any are imposed, require the exemption of the road from State control.

In *Smyth v. Ames*⁴² this principle was approved. In that case the court held that even the express reservation by Congress of the authority to reduce rates of fare when found unreasonably high, and to fix rates and establish them by law whenever the net earnings of the road, ascertained upon a named basis, should exceed a certain amount, was not to be taken as evidence that Congress, when not itself acting, desired to exempt the road from State regulation as to charges for transportation begun and completed within the State. "It ought not to be supposed," the court said, "that Congress intended, that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper, independently of the rights of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. . . . Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands

⁴⁰ *Howard v. Illinois Central Railroad Company* (207 U. S. 463).

⁴¹ 154 U. S. 418.

⁴² 169 U. S. 466.

in the way of a State prescribing rates for transporting property on that road wholly between points within its territory."

§ 472. Federal Permission to State Manufacturing Companies to Engage in Interstate Commerce.

The denial to Congress of the power to charter companies empowered to do a manufacturing business within the States does not carry with it the denial of a power to require of individuals or of State-chartered companies a Federal permission to engage in interstate commerce whether as carriers or as shippers of goods across State borders, if the right to engage in interstate commerce or to make use of interstate commercial instrumentalities be held to be a right which exists only by reason of Federal constitutional or statutory provision. The lottery case of *Champion v. Ames* has illustrated the extent of the Federal power to exclude commodities from interstate trade. Applying the doctrine of this case, it may be held that while Congress may not be able to charter manufacturing companies, which the States may not exclude from their borders, it may refuse to individuals or State-chartered concerns the right to ship their products across State lines except upon certain conditions, which conditions may be so stated as to bring the companies and the individuals, so far as they make use of interstate commerce agencies, within a rigorous Federal control.⁴³

§ 472a. Federal Taxing Power and Interstate Commerce.

A Federal tax may be laid upon interstate commerce, its instrumentalities, the articles carried, or the privilege of engaging in it, either as a revenue measure or as a means of regulation. If the tax should be laid for a regulative purpose, its constitutionality would be dependent wholly upon the Commerce Clause, and, not being, except in form, a tax, would not be subject to the express limitations as to apportionment, etc., imposed by the Constitution upon the exercise of the taxing power by the United States.⁴⁴

A genuine tax imposed for revenue purposes, if assessed upon the commodities of interstate commerce or upon the instrumentalities of commerce as property, would be a direct tax and would have to be apportioned among the States according to their respective populations. That this is so sufficiently appears from the doctrines of *Knowlton v. Moore*.⁴⁵

If the tax should be one upon the privilege of engaging in, or carrying on interstate commerce, it would in all probability be construed to be

⁴³ *Cf. Veazie Bank v. Fenno* (8 Wall. 533); *United States v. Marigold* (9 How. 560); *United States v. Joint Traffic Association* (171 U. S. 505); *Champion v. Ames* (188 U. S. 321).

⁴⁴ *Cf. Veazie Bank v. Fenno* (8 Wall. 533).

⁴⁵ 178 U. S. 41.

constitutionally an indirect tax.⁴⁶ The case that would probably be held controlling as to this is *Nicol v. Ames*⁴⁷ in which a stamp act on sales made at an exchange or board of trade was held to be not a direct tax on the property sold, but an indirect tax in the nature of an excise on the facilities offered at the exchanges or boards of trade.⁴⁸

A more doubtful point, however, is whether such an excise tax upon the right to engage in interstate commerce would not come within the constitutional provision that "no tax or duty shall be laid on articles exported from any State." That it would be held to be a tax on exports from a State would seem to follow from the reasoning of the court in *Brown v. Maryland*;⁴⁹ but, if the doctrine of *Woodruff v. Parham*⁵⁰ be followed, it will be held that the prohibition of the Constitution applies only to exports from a State to foreign countries.

⁴⁶ Although economically a direct tax.

⁴⁷ 173 U. S. 509.

⁴⁸ See also *Spreckels Sugar Ref. Co. v. McClain* (192 U. S. 397); and *Flint v. Stone Tracy Co.* (220 U. S. 107). In *Pollock v. Farmers' L. & T. Co.* (158 U. S. 601) the court by way of caution said: "We do not mean to say that an act . . . might not lay excise taxes on business, privileges, employments and vocations," without needing to be apportioned.

⁴⁹ 12 Wh. 419.

⁵⁰ 8 Wall. 123.

CHAPTER XLV

FEDERAL LEGISLATION IN REGULATION OF COMMERCE

§ 473. Affirmative Regulation by Congress Long Delayed.

It is a rather remarkable fact that the Constitution had been in operation for almost a century before Congress deemed it desirable to exercise its authority to regulate, in an affirmative manner, commerce between the States. Before this the commercial power granted to the Federal Government had been employed only by way of preventing an interference with interstate and foreign commerce by the States.¹

§ 474. Railroad Regulation Prior to 1887.

Since the time that railways came to play an important part in the transportation of persons and goods, governments had presented to them three alternatives: (1) to rely upon the requirements of the common law with reference to the reasonableness of rates, equality of treatment of shippers by common carriers, and adequacy and safety of service; (2) to resort to public ownership and operation of the roads; or (3) to leave the roads in private hands but to impose upon them legislative and administrative regulations with regard to their rates and modes of operation.

Prior to 1887 the first alternative was adopted in the United States. From that date, with the exception of a few years during and immediately following the Great War, when governmental operation of the railways was undertaken, the second of the alternatives has been pursued.

Railway transportation in America dates from about 1830, and from that date until 1870 was a period of railway construction, which, in some cases, was directly aided by the State and Federal Governments. During these years, however, the railways, in their operations, were almost wholly free from governmental interference. This freedom from control led to great evils which the States, during the years from 1870 to 1887, attempted to meet by legislation, some of it drastic in character. It is also to be observed that the period from 1870 to 1887, was one of great activity in railway building,—much of it in anticipation of future needs rather than to meet immediate requirements, and some of it engineered by reckless

¹ In 1866 there had been an act of Congress providing for the use of railway rights of way by telegraph lines; and there had been considerable congressional legislation granting Federal aid for construction of the Pacific or transcontinental lines of railway.

financeering upon the part of both the railways and the State governments which extended aid to them.²

§ 475. State Railway Regulation, 1870-1887.

The general character of the State railway legislation of the period from 1870 to 1887 is stated as follows by Professor Sharfman in his volume *The American Railroad Problem*:³

"The public mind came to realize that the presence of extensive railroad systems does not necessarily constitute an unalloyed blessing. It was recognized that extraordinary powers were vested in those in control of railroad transportation, and that these powers could be exercised, as in many cases they were exercised, as mere sources of private gain, and in distinct contravention of the public good. The public hostility was nourished by industrial fluctuation resulting from destructive rate wars, by the unjust distribution of preferential railroad advantages, in rates and service, to favored shippers and strategic localities, by scandalous financial manipulation in the construction and management of many of the railroad properties. . . . The impulse toward railroad control came from the Middle West. The railway abuses of the late sixties and of the early seventies were most keenly felt in that part of the country, and the agitation for public regulation was largely supported by concerted efforts in the States of Illinois, Wisconsin, Minnesota, Iowa, and Missouri. . . . The agitation for relief was espoused by the Farmers' Granges of these Midwestern States, as a result of which the demand for railroad regulation came to be known as the Granger Movement, and the statutory enactments to which it gave rise, between 1871 and 1875, as the Granger Legislation. This legislation dealt almost exclusively with the problem of rates. Unreasonable rates and unjust discriminatory practices were prohibited by statute; schedules of maximum rates to be observed by the railroads were prescribed by legislative enactment; and State commissions were organized for the enforcement of the statutory provisions. These commissions, being clothed with powers of rate control, exercised authority much broader in scope than that possessed by the commissions that had been established in a number of the Eastern States for some decades. The powers of the earlier commissions had been generally limited to inspection of physical plant, collection of railway statistics, and investigation of alleged violations of charter authority or legislative provisions. While the Granger Legislation differed in detail in the various States, and while much reliance was placed upon direct statutory prescription, so that the jurisdiction and powers of these older commissions were not nearly as extensive as those of the modern railroad commissions of the mandatory

² In 1887, 108 railroads, with a mileage of 11,066 miles were in the hands of receivers.

³ P. 38.

type, the general tendency was to center authority in the newly created administrative agencies." ⁴

§ 476. Federal "Police Power" with Regard to Commerce.

Congress has enacted various laws for the regulation of interstate and foreign commerce, which, so far as their substance is concerned, may properly be denominated police regulations. Among them are those relating to the use of safety appliances, hours of service of employees, monthly reports of accidents, arbitration of controversies between railroads and their employees, the exclusion of impure goods and lottery tickets from interstate transportation, employers' liability, etc. Strictly speaking, however, the constitutional authority for this legislation has not been derived from any general "police power" possessed by the Federal Government, but from the grant of authority in the Commerce Clause. That these laws, in so far as they are constitutional, draw their validity from this clause and not from a Federal police power is a corollary from the general doctrine that the General Government possesses no powers whatever except by way of express grant, and by implication from such grants.⁵

The manner in which Congress, in regulating interstate commerce, has exercised what, in substance at least, has amounted to "police powers," is described in the sections which follow.

§ 477. Federal Safety Appliances Acts.

Congress has, by a series of acts, beginning with that of 1893, sought to increase the safety of trains crossing State lines, by requiring that they shall be equipped with certain approved safety devices. The constitutionality of the first of these measures has been affirmed by the Supreme Court.⁶ And in *Howard v. Illinois Central R. Co.* Justice Moody in his

⁴ As to the constitutionality of this legislation, see especially *Munn v. Illinois* (94 U. S. 113).

Generally, as to railroad conditions in 1887, see the First Annual Report of the Interstate Commerce Commission.

⁵ Cf. *Columbia Law Review*, IV, 563, Article "Is There a Federal Police Power?" by Paul Fulmer.

Cooke in his *Commerce Clause of the Federal Constitution* (§§ 38, 39), argues that the Federal power under the Commerce Clause should be held to justify only those regulations which are for the benefit of those enjoying the benefit of interstate transportation. "For instance," says Cooke, "in the case of a corporation there are many matters of internal management, thus the amount and character of capital stock and indebtedness, as to which it seems doubtful whether any regulation thereof would be for the benefit of transportation by such corporation. Much at least of such regulation would seem to be merely for the benefit of the public, and though within the power of the States, beyond the scope of the Commerce Clause. . . . By this test a mere regulation of, for instance, the liability of a carrier to its employees for negligence seems not within such scope."

⁶ *St. Louis, etc., Co. v. Taylor* (210 U. S. 281).

dissenting opinion declared, "if the statute now before us is beyond the constitutional power of Congress surely the safety appliance act is also void, for there can be no distinction in principle between them." This was, of course, *obiter*, and, it would seem, a statement unadvisedly made, for it is clear that the requirement that safety appliances be used has a direct relation to the instrumentalities of interstate commerce, and that the power to regulate interstate commerce includes the authority to regulate the instrumentalities by which it is carried on has been repeatedly held by the Supreme Court.⁷

In *Johnson v. Southern Pacific R. Co.*⁸ the Safety Appliance Law was considered and applied without question as to its constitutionality.

In *United States v. Colorado & N. W. R. Co.*⁹ these acts were held applicable to lines of railroad lying wholly within a State, but serving as a link in an interstate route.

§ 478. Federal Quarantine Regulations.

This subject is later dealt with in connection with the discussion of the constitutional power of the United States to exclude commodities from interstate and foreign commerce.¹⁰

§ 479. Labor and Interstate Commerce.

Under its authority to regulate interstate commerce Congress has enacted a number of measures relating to the conditions of work and of the labor contract of employees engaged in interstate commerce.

§ 479a. Federal Hours of Labor Law.

By act of March 4, 1907, entitled "An Act to Promote the Safety of Employees and Travellers upon Railroads by Limiting the Hours of Service of Employees Thereon,"¹¹ Congress has undertaken to determine the number of hours a day which employees upon interstate railways may be permitted or required to labor. This measure relates to the contract

⁷ "Commerce, in its simplest signification, means an exchange of goods; but, in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities and enter into commerce; the subject, the vehicle, the agent, and their various operations become the objects of commercial regulations." Justice Johnson in *Gibbons v. Ogden* (9 Wh. 1).

"It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on." *Sherlock v. Alling* (93 U. S. 99).

"The power . . . embraces within its control all instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged." *Gloucester Ferry Co. v. Pa.* (114 U. S. 196). The Safety Appliance Acts also meet the test suggested by *Cooke*.

⁸ 196 U. S. 1.

⁹ 157 Fed. Rep. 321.

¹⁰ See Chapter LVI.

¹¹ 34 Stat. at L. 1415.

between the employing companies and their employees and thus falls in the same category as the Employers' Liability Act. Its relation to safe and efficient service would, however, seem to be somewhat more direct than the latter act.

The only important litigation of constitutional importance with reference to this Hours of Labor Act has been as to the extent to which it operates to exclude legislative control in the premises by the States.

In *Northern Pacific R. Co. v. Washington*,¹² the court upheld, by necessary implication, the constitutionality of the Hours of Labor Act, and also declared that the statute was so comprehensive as to preclude the States from legislating in the premises. Indeed, it held that the States were thereby disqualified from acting during the period between the dates of the act and the time when, by its express provisions, it should go into effect.¹³

§ 480. Disputes between Interstate Carriers and Their Employees— Erdman Act of 1898.

By an act of October 1, 1888,¹⁴ later repealed and replaced by that of June 1, 1898, known as the Erdman Act,¹⁵ Congress made provision for mediation in and arbitration of disputes between interstate carriers and their employees. The three arbitrators were selected, one by the company, one by the employers directly interested, and the third by these two, and given power to take testimony, summon witnesses, administer oaths, ask for the production of papers, etc. Section 3 provided that the testimony and the award of the arbitrators, when filed in the Circuit Court for the district in which the controversy arises, should be final and conclusive on both parties unless set aside for error of law apparent on the record, but that no employee should be compelled to render personal services without his consent.

Section 10 declared, *inter alia*, that it would be a misdemeanor for employer or agent to require of an employee, as a condition of employment, that he would not become or remain a member of a trade union, or threaten him with loss of employment if he should become or remain a member.¹⁶

¹² 222 U. S. 370.

¹³ See also *Erie R. Co. v. New York* (233 U. S. 671), in which it was held that the States were disqualified by the act from legislating with regard to the hours of labor of employees of interstate railway carriers using the telegraph or telephone in connection with the movement of trains.

¹⁴ 25 Stat. at L. 501.

¹⁵ 30 Stat. at L. 424.

¹⁶ Section 10: "That any employer subject to the provisions of this act, and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership

§ 481. *Adair v. United States.*

The aim of Section 10 was to prevent the blacklisting of employees, to make unlawful the requirement by the employer of an agreement on the part of his employees to release them from liability for injuries, and in general to protect the labor organizations. The constitutionality of this section was denied in several cases in the lower Federal courts,¹⁷ and, finally, the same position was assumed by the Supreme Court in *Adair v. United States*,¹⁸ decided in 1908.

In this case *Adair*, an agent of a railway company engaged in interstate commerce, was charged with having, in violation of the tenth section of the act of 1898, dismissed from the service of the company an employee because of his membership in a labor organization. *Adair* set up the unconstitutionality of this section on the double ground that it was a violation of the Fifth Amendment, being a deprivation of liberty without due process of law; and that it was not justified by the Commerce Clause, and, therefore, void as relating to matters the regulation of which is reserved exclusively to the States. Both of these contentions were held sound by the Supreme Court. As to the latter of these points, the opinion denied that there was any "possible legal or logical connection" between an employee's membership in a labor organization and the carrying on of interstate commerce. It cannot be assumed, the court asserted, that the fitness or diligence of the employee is in any wise determined by such membership. As to the constitutionality of the provisions of the act with reference to arbitration no opinion was expressed.¹⁹

The Erdman Act related only to employees engaged in actual train serv-

in such a labor corporation, association, or organization; or who shall require any employee or any person seeking employment, as a condition of such employment, to enter into a contract whereby such applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

¹⁷ *United States v. Scott* (148 Fed. Rep. 431); *R. R. Telegraphers v. Louisville & N. Ry. Co.* (148 Fed. Rep. 437), the court in the first case declaring that "Section 10 of the act of June 1, 1898, is not, in a constitutional sense, a regulation of commerce, or of commercial intercourse among the States, and cannot justly or fairly be so construed or treated, inasmuch as its essential object manifestly is only to regulate certain phases of the right of an employer to choose his own servants, whether the duties of those servants when employed relate to interstate commerce or not."

¹⁸ 208 U. S. 161.

¹⁹ Justices McKenna and Holmes dissented.

ice (in this respect being narrower than the act of 1888), and resort to the arbitral board might be had only with the consent of both employee and employer.

As regards conciliation, the act (Section 2) provided that, in case of disputes seriously threatening to interrupt the business of a railroad, the Commissioner of Labor and the Chairman of the Interstate Commerce Commission should, upon the request of either party, endeavor to bring about a settlement, and, if these proved unavailing, to secure an arbitration as provided for in the law.

It was provided that, pending the arbitration, the status existing immediately prior thereto should not be changed, but that no employee should be compelled to render personal service without his consent.

Section 7 of the act further provided: "That during the pending of this Act it shall not be lawful for the employer, party to such arbitration, to discharge the employees, parties thereto, except for inefficiency, violation of law, or neglect of duty; nor for the organization representing such employees to order, nor for the employees to unite in, aid, or abet, strikes against said employer; nor during the period of three months after an award under such an arbitration, for such employer to discharge any such employees, except for the causes aforesaid, without giving thirty days' written notice of an intent so to discharge; nor for any of such employees, during a like period, to quit the service of said employer without just cause, without giving to said employer thirty days' written notice of an intent so to do; nor for such organization representing such employees to order, counsel, or advise otherwise. Any violation of this section shall subject the offending party to liability for damages; *Provided*, That nothing herein contained shall be construed to prevent any employer, party to such arbitration, from reducing the number of its or his employees whenever in its or his judgment business necessities require such reduction."

The Erdman Act, in several of its provisions showed, as is seen, a desire upon the part of Congress to make use of organizations of railway employees. Thus, in Section 3, the arbitrator, selected on behalf of the employees was to "be named by the labor organization to which the employees directly interested belong, or, if they belong to more than one, by that one of them which specially represents employees of the same grade or class and engaged in services of the same nature as said employees so directly interested."²⁰

²⁰ There was the *proviso* "That when a controversy involves and affects the interests of two or more classes and grades of employees belonging to different labor organizations, such arbitrator shall be agreed upon and designated by the concurrent action of all such organizations; and in cases where the majority of such employees are not members of any labor organization, said employees may by a majority vote select a committee of their own number, which committee shall have the right to select the arbitrator on behalf of said employees."

By Section 8 of the act it was provided that every trade union nationally incorporated under the provisions of the act of Congress of 1886,²¹ should provide in its articles of incorporation and in its constitution, rules and by-laws that a member should cease to be such by participating in or instigating force or violence against persons or property during strikes, lockouts, or boycotts, or by seeking to prevent others from working through violence, threats or intimidations.

This Section 8 also provided that "Members of such incorporations shall not be personally liable for the acts, debts, or obligations of the corporations, nor shall such corporations be liable for the acts of members or others in violation of law; and such corporations may appear by designated representatives before the Board created by this Act, or in any suits or proceedings for or against such corporations or their members in any of the Federal courts."

From this statute some desirable results were reached in the way of mediation, but little in the way of arbitration. Only four disputes out of the sixty-one which came under the act were settled by arbitration alone.

§ 482. Newlands Act of 1913.

In 1913, the so-called Newlands Act²² replaced the Erdman Act. By this time labor problems upon interstate railways had assumed larger proportions due to the development of intercorporate relations between the railway companies and an increase in the power of the railway labor organizations or brotherhoods, as they were called; and the enactment of the Newlands Act was forced by the threatened strike upon the part of employees of some forty-two railways for the prevention of which the railways refused to resort to the Erdman Act.

This new law provided for a Commissioner of Mediation and Conciliation, to be appointed by the President of the United States, by and with the advice and consent of the Senate, and also for a permanent body with the title "United States Board of Mediation and Conciliation" which was to be constituted of the Commissioner and two other officers of the Federal Government who were to be designated by the President. This Board was authorized to intervene in disputes between the carriers and their employees, *ex proprio motu*, whenever, in its judgment, there was imminent danger of an interruption of traffic which would be seriously detrimental to the public interest. The provisions of the Erdman Act regarding arbitration were substantially retained except that the boards of arbitration might, if desired, be increased from three to six members.²³

²¹ 24 Stat. at L. 86.

²² 38 Stat. at L. 103.

²³ In 1913 the refusal of the railway companies to resort to the provisions of the Erdman Act had been based, in part at least, upon their unwillingness to place the decision in the hands of such a small number of men as three.

Considerable use was made of the machinery thus provided, but the results can hardly be said to have been very satisfactory either to the parties to the disputes or to the public. In 1916 came the threat of a nation-wide railway strike which led to the passing of the so-called Adamson Act.

§ 483. Interstate Commerce and the Regulation of Wages: The Adamson Act.

By the Adamson Act of September 3, 5, 1916, entitled "An Act to Establish an Eight Hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce, and for Other Purposes,"²⁴ Congress, despite this title, sought to fix the compensation to be paid to the employees rather than to establish the legal length of their working days.

By this measure it was provided that, in contracts for labor and service, eight hours should "be deemed a day's work, and the measure or standard of a day's work for the purpose of reckoning the compensation of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated, not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads," engaged in interstate and foreign commerce. The act also provided that the President of the United States should appoint a commission which should observe the operation and effects of the act for a period of not less than six months and not more than nine months and report its findings to the President and to Congress; and that, pending this report and for thirty days after its rendition, the compensation of the employees should not be reduced below the then prevailing standard day's wage, and that for all necessary time in excess of eight hours the employees should be paid at a rate not less than the *pro rata* rate for such standard eight-hour labor day.

The act was an emergency measure, passed in order to prevent a general strike upon the part of the railway employees and a consequent serious interference with railway transportation.

The constitutionality of this act came before the Supreme Court and was upheld in the case of *Wilson v. New*, decided in 1917.²⁵ In its majority opinion, read by Chief Justice White, the court first considered whether Congress had any constitutional power to deal with the subjects embraced within the act. The court, after pointing out that, while the wage scale which was fixed was a temporary one, the standard was a permanent one, and that the President of the United States had invited a conference between the parties, and had proposed arbitration, which the employers had agreed to, but which the employees rejected, said: "That the business of common carriers by rail is in a sense a public business because of the

²⁴ 39 Stat. at L. 721.

²⁵ 243 U. S. 332. Four justices dissented.

interest of society in the continued operation and rightful conduct of such business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, State and Federal, and is illustrated by such a continuous exertion of State and Federal legislative power, as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed-on standard is not subject to be controlled or prevented by public authority. But, taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view—that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent,—it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject, and to give effect by appropriate legislation to the regulations thus adopted. This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words, that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency, and that emergency cannot be made the source of power. *Ex parte Milligan*, 4 Wall. 2. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce, may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce.”

After reviewing some of the more important regulations of commerce by Congress, such as those relating to the fixing of reasonable rates, as to bills of lading, as to hours of service and employers' liability, the court continued: “In the presence of this vast body of acknowledged powers there

would seem to be no ground for disputing the power which was exercised in the act which is before us so as to prescribe by law for the absence of a standard of wages, caused by the failure to exercise the private right as a result of the dispute between the parties,—that is, to exert the legislative will for the purpose of settling the dispute, and bind both parties to the duty of acceptance and compliance, to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. . . . Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service if there was no power in government to prevent all service from being destroyed? . . . We are of opinion that the reasons stated conclusively establish that, from the point of view of inherent power, the act which is before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result. If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it."

Regarded as an interference with the private rights of the carriers or of their employees, the court said that, in the first place, "the capacity to exercise the private right free from legislative interference affords no ground for saying that legislative power does not exist to protect the public interest from injury resulting from a failure to exercise the private right," and, in the second place, that no purely private right was, in fact, involved, since the parties to the suit were engaged in a business charged with a public interest.

The bearing of the case of *Wilson v. New* upon the matter of due process of law and the regulation of commerce will be more fully discussed in another place.²⁶

The essential constitutional fact involved in this validation of the Adamson Act is that, for the first time, the court held that the Federal

²⁶ Section 1228.

power to regulate commerce includes a power to regulate the wages of persons employed therein by carriers. It is, however, to be observed that it is by no means sure that the case of *Wilson v. New* can be cited as authority for the exercise by Congress of a wage-fixing power under all circumstances, for, in the first place, as appears in the quotations from the majority opinion given above, the court qualified its holding by saying that, "under the circumstances disclosed," the wage fixing amounted to a compulsory arbitration of a dispute between the carriers and their employees, by establishing as to the subject-matter under dispute, a binding legislative standard; and, in the second place, that the interference with the private rights of the parties had taken place only after those parties had failed to exercise their right to come to an agreement. It may be, then, that, if, in the future, Congress should attempt further wage-fixing legislation, it will be declared by the court that the case of *Wilson v. New* can be deemed authority only as applied to substantially similar conditions of fact, that is, of extreme emergency and of the failure of the parties themselves to adjust their wage disputes. It is also to be noted that four justices vigorously dissented as to the constitutionality of the act, alleging that the law was either not a regulation of commerce, and had no such object or effect,²⁷ or that it worked as to the parties a denial of due process of law, or that both objections applied. It is, however, to be observed that six justices held the act to be regulatory of interstate commerce.

§ 484. Labor Provisions of the Transportation Act of 1920.

The experiences of the preceding few years, and especially those attending the enactment of the Adamson Act, made it evident that, if possible, some means more effective than those that had previously been employed, should be provided for obtaining an equitable adjustment of the demands of railway employees without interruption to the running of the railroads. These more efficient means were sought to be supplied by Title III of the Transportation Act of 1920, the provisions of which were declared to apply to "any express company, sleeping car company, and any carrier

²⁷ "It removes no impediment or obstruction from the way of traffic or intercourse, prescribes no service to the public, lays down no rule respecting the mode in which service is to be performed, or the safeguards to be placed about it, or the qualifications or conduct of those who are to perform it. In short, it has no substantial relation to or connection with commerce, no closer relation than has the price which the carrier pays for its engines and cars or for the coal used in propelling them. The suggestion that it was passed to prevent a threatened strike, and in this sense to remove an obstruction from the path of commerce, while true in fact, is immaterial in law. It amounts to no more than saving that it was enacted to take care of an emergency. But an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government (*Ex parte Milligan*, 4 Wall. 2)." Justice Pitney's dissenting opinion. For an acute criticism of this opinion, see the article by Prof. T. R. Powell, "The Supreme Court and the Adamson Law" in *Univ. of Penn. Law Rev.*, Vol. 65, pp. 607-631.

by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation."

The act declared that it should be the duty of all carriers and their officers to make every reasonable effort to avoid any interruption to the operation of their roads growing out of disputes between themselves and their employees, and that all such disputes should be considered, and, if possible, decided "in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute." If disputes were not decided in these conferences they were to be referred to a Board of Labor Adjustment, provision for which was made by the act.

These Adjustment Boards might be established by agreements between a carrier and its employees, or by a group of carriers and their employees. The act provided that, upon their own initiation or upon application made to them, these Boards might take jurisdiction of and decide disputes involving grievances, rules, or working conditions which it had not been possible to adjust in the conferences already mentioned.

The act furthermore provided for the establishment of a body to be known as the "Railroad Labor Board," which was to be composed of nine members; three representing labor, appointed by the President from a list of names submitted by the railway employees; three representing the carriers, similarly appointed; and three representatives of the public, appointed by the President by and with the advice and consent of the Senate. These Board members were to receive yearly salaries of \$10,000 and to hold office for five years. They might be removed from office by the President for neglect of duty or malfeasance in office, but for no other reason.

The jurisdiction of the Railroad Labor Board was limited to those disputes relating to grievances of working conditions which were not settled by an Adjustment Board. However, in case no Adjustment Board was organized the dispute was to go directly from the individual railroad to the Labor Board.

With regard to wages disputes, the act read: "The Labor Board (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized or subordinate officials directly interested in the dispute or (3) upon the Labor Board's own motion if it is of opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in section 301 [i. e., in Conferences]."

The Board was also given the right to suspend the decisions reached in

Conferences with respect to wages or salaries of employees, if it should be of opinion that the decisions involved such an increase in wages or salaries as would be likely to necessitate a substantial readjustment of the rates of any carrier.

For its decisions a concurrence of at least five of its members was required, and, with reference to wages disputes, these five were to include at least one of the representatives of the public.

The act provided that all decisions of the Adjustment Boards and of the Labor Board should be just and reasonable, and that, in determining this matter of justness and reasonableness, the Board should, so far as applicable, among other relevant circumstances, take into consideration: "(1) The scales of wages paid for similar kinds of work in other industries; (2) The relation between wages and the cost of living; (3) The hazards of the employment; (4) The training and skill required; (5) The degree of responsibility; (6) The character and regularity of the employment; and (7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments."

In addition to its adjudicative functions, the Labor Board was given wide investigative authority, accompanied with the right to summon witnesses, obtain testimony, etc. The act provided that the Board: "Shall investigate and study the relations between carriers and their employees, particularly questions relating to wages, hours of labor, and other conditions of employment and the respective privileges, rights, and duties of carriers and employees, and shall gather, compile, classify, digest, and publish, from time to time, data and information relating to such questions to the end that the Labor Board may be properly equipped to perform its duties under this Title and that the members of the Adjustment Boards and the public may be properly informed."

Section 316 of the act provided that "The powers and duties of the Board of Mediation and Conciliation created by the act approved July 15, 1913 [Newlands Act] should not extend to any dispute which might be received for hearing and decision by any Adjustment Board or the Labor Board." Thus the Newlands Board of Mediation and Conciliation was not abolished, but its jurisdiction limited as above indicated.

Decisions of the Board were to be made public by being transmitted to the President of the United States. If its recommendations were not followed this fact was also to be published.

In *Pennsylvania R. Co. v. Railroad Labor Board*²⁸ it was judicially settled that the Board's decisions were to have no legally binding force. The court said: "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of

²⁸ 261 U. S. 72.

the conclusion, strengthened by the official prestige of the board and the full publication of the violation of such decision by any party to the proceeding. . . . The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it."

In this case the railroad had sought an injunction against the threatened publication by the Board of its statement that the road had violated the Board's decision rendered in proceedings in which, it was alleged, the Board had exceeded its lawful powers. The court, affirming a decree of the Circuit Court which had reversed a decree of the District Court granting the injunction, held that a labor union was an "organization of employees" whose executive might, under the act, make application to the Labor Board for its decision in a pending dispute between a carrier and its employees; and that the Board, in reaching a decision as to the rules and working conditions between railroads and their employees, was not limited to a consideration of the legal rights of employees with respect to whom they were to deal with, as of the employees as to who were to be their representatives. The court said: "But title III. was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees, or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to co-operate in running the railroad. It was to reach a fair compromise between the parties, without regard to the legal rights upon which each side might insist in a court of law. The board is to act as a board of arbitration. It is to give expression to its view of the moral obligation of each side, as members of society, to agree upon a basis for co-operation in the work of running the railroad in the public interest. The only limitation upon the board's decisions is that they should establish a standard of conditions which, in its opinion, is just and reasonable. The jurisdiction of the board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the board decides they should do except the moral constraint, already mentioned, of publication of its decision.

"It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the railway company to recognize or to deal with or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen, with a view to securing a satisfactory co-operation, and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions, and the moral sanction. The Labor Board must

comply with the requirements of the statute; but, having thus complied, it is not, in its reasonings and conclusions, limited, as a court is limited, to a consideration of the legal rights of the parties."

§ 485. Railway Labor Act of 1926.

By an act approved May 20, 1926, and known as the Railway Labor Act,²⁹ Congress has sought to improve the instrumentalities and methods provided in the Transportation Act of 1920. The measure as finally adopted had the approval of the representatives of both the railway employees and the higher railway executives. The act expressly repeals Title III of the Transportation Act of 1920 and the act of July 15, 1913, providing for mediation, conciliation, and arbitration.

The act applies to "any express company, sleeping-car company, or any carrier by railroad, subject to the Interstate Commerce Act, including all floating equipment such as boats, barges, tugs, bridges and ferries; and other transportation facilities used by or operated in connection with any such carrier by railroad." Interurban or suburban electric railways, unless operated as parts of a general steam railroad system of transportation, are, however, expressly excluded from the operation of the act.

The provisions of the act are elaborate in character and cannot be here detailed. The following summary of them is that of Professor J. P. Chamberlain.³⁰

"The basic principles of the act are collective bargaining and voluntary adjustment of disputes between representatives of the roads and of their employees. Then if a difficulty cannot be smoothed in this normal fashion, the public authority is to intervene to try to mediate between the parties and finally to investigate and publish the facts to inform the public.

"Collective bargaining is made a duty. Carriers and their employees must make agreements on pay and working conditions and must do their best to settle disputes between themselves. There are two kinds of disputes, minor, concerning the interpretation of agreements and grievances, and major, which includes all other questions, notably changes in the agreements in regard to wages or conditions of service.

"Minor disputes which are not settled in their regular course go first to a conference of representatives of the carrier and its employees. This conference must be called on the request of either side unless a different way of settling disputes is provided in an agreement between the carrier and its employees. The next step is formal and may involve groups of carriers. It is taken through Boards of Adjustment, clearly intended to be in the main regional, which are set up either by agreement 'between

²⁹ 44 Stat. at L. 577.

³⁰ As given in the *American Bar Association Journal*, September, 1926. For further discussion of this act, see 17 *American Economic Rev.* 177; and 36 *Journal of Political Economy*, 53.

any carrier or group of carriers or the carriers as a whole, and its or their employees.' So again only those directly involved have a hand in the settlement. Even a minor dispute, especially if it turn on the interpretation of a provision usually included in agreements, may well concern 'the carriers as a whole.' An interesting provision of the law permits either party or both to ask the Board of Mediation set up by the act, to interpret the meaning of a term in an agreement, a sort of advisory opinion by an impartial official body.

"Major disputes must also be taken first before a conference. The act requires 30 days' written notice of a change affecting pay or working conditions. Within these 30 days, the conference must take place. Either minor or major disputes may be submitted to arbitration, under the machinery provided by the law.

"In the event that disputes cannot be settled directly between the parties or by arbitration on their initiative, the government intervenes through a Board of Mediation of five members appointed for five years by the President and Senate. The importance of the Board is evidenced by the salary, \$12,000 a year, and the desire to keep it out of politics by the well known plan of having one member go out of office each year. The Board may come into action either at the request of one of the parties, or on its own motion. It is required first to try to bring about an agreement, but if that effort fails, to induce the parties to arbitrate. If the parties consent to arbitration, each appoints one of a board of three or two of a board of six arbitrators, who then select the other members of the Board. If they do not agree within five days in case of a board of three, fifteen days for a board of six, the Board of Mediation makes the appointment.

"The Board also acts as repository of agreements to arbitrate, and of awards. If either party wants the meaning of a term of the award passed on by the original Board of Arbitration, the Board of Mediation reconvenes the Board of Arbitration at its request.

"The danger of vagueness in submissions to arbitration is dealt with by providing that the agreement stipulate the questions to be submitted which cannot thereafter be withdrawn except by consent of both parties, and the risk of interminable hearings is met by requiring that the agreement fix the time when the award must be filed. The Board of Arbitration has the power to compel testimony by requesting the clerk of the federal district court to issue a subpoena, obedience to which will be enforced by the judge. An arbitral award is conclusive on the parties 'as to the merits and facts of the controversy submitted to arbitration,' and unless impeached within ten days after it is filed in the clerk's office of the district court, the court must enter judgment on the award, which 'shall be final and conclusive on the parties.'

"The award may be impeached by petition to the district court because of nonconformity with the act of the award or of the proceedings, because

the award does not conform or confine itself to the agreement to arbitrate, or because a member of the Board was guilty of fraud or corruption or a party practiced fraud or corruption which influenced the result. Ten days after the decision of the district court an appeal may be made to the circuit court of appeals, whose determination of the case is final.

"The award is thus made a judgment and so enforceable through judicial process. There are two interesting sections bearing on the effect of the judgment. One requires a stipulation in the agreement that a difference of opinion in respect to the meaning of the award, become a judgment, is to be decided by the original board of arbitration, whose decision shall take effect on being filed in the clerk's office, thus amending the judgment without action by the judge, and the second protects the freedom of the employee to quit work as an individual. No process of the court shall issue to compel him to perform service, nor shall the act be construed to compel him, acting individually, to work without his consent, nor shall his quitting work, as an individual, be held illegal in consequence of anything in the act.

"The procedure to stop strikes is so far purely voluntary, and depends on the good will of the parties or the power of persuasion of the Board of Mediation. If no settlement is arrived at, however, the act provides a means of informing and arousing public opinion independently of the parties. The Board of Mediation may notify the President that a situation exists which threatens the interruption of interstate commerce 'to a degree such as to deprive any section of the country of essential transportation service,' and he may then create an Emergency Board to investigate and report within thirty days. No power to compel appearance of witnesses is given this board, which must depend on the desire of each party to explain its own side of the case to the public. Of great importance is the provision that for thirty days after the Board has reported to the President, 'no change except by agreement shall be made by the parties to the controversy in the conditions out of which the dispute arose.' Thus the operation of the carriers must be continued for a period which may extend to sixty days, thirty days for investigation and thirty days for negotiation after the report is made. Public opinion will have time in which to make itself felt and information on which to act."

§ 486. Child Labor and Interstate Commerce.

This subject will be dealt with in the chapter dealing with "Exclusion from Interstate Commerce."

§ 487. The Clayton Act.

The act of October 15, 1914,³¹ known as the Clayton Act, contains provisions of importance to labor organizations in their relation to inter-

³¹ 38 Stat. at L. 730.

state commerce. These deal with the circumstances under which injunctions may be issued in labor disputes; to the declaration that "the labor of a human being is not a commodity or article of commerce"; and to the statement that labor organizations are not to be deemed illegal combinations or conspiracies in restraint of trade under the anti-trust laws of the United States. It will, however, be more convenient to consider these provisions in connection with the anti-trust legislation of Congress than to deal with them here.

§ 488. The Federal Interstate Commerce Employers' Liability Law of 1906.

In 1906 Congress passed an act entitled "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories and Common Carriers Engaged in Commerce between the States and between the States and Foreign Nations to their Employees,"³² by which act the fellow-servant doctrine of the common law was considerably modified. By the terms of this act "every common carrier in trade or commerce" in the District of Columbia or in the Territories or between the several States was made liable for the death or injury of "any of its employees" which should result from the negligence of "any of its officers, agents, or employees." It thus appears that the provisions of the acts were made applicable to these companies irrespective of the fact whether the person injured or killed was engaged at the time in interstate commerce. The only criterion prescribed was that the employing company was one carrying on commerce among the States. There was thus raised the fundamental question whether the simple fact that a company or corporation is, in any part of its business, engaged in carrying on interstate commerce renders it subject to Federal regulation as to all its activities. There was also raised the question whether the relation between an employing company and its employees is itself a part of the interstate commerce which the company carries on. Both of these questions were discussed in *Howard v. Illinois Central R. Co.*³³

The first and more important question the court answered in the negative, as has been earlier pointed out.³⁴ As to the second question, the court said: "We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce, or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train; that is, a train moving in interstate commerce, and the regulation of which therefore is, in the nature of things,

³² 34 Stat. at L. 232.

³³ 207 U. S. 463.

³⁴ See *ante*, § 416.

a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power, would be but to concede that power and then to deny it; or, at all events, to recognize and yet render it incomplete."

The court then went on to hold the act void as to the States because its application was not limited by its terms to injuries and deaths incurred by persons while engaged at the time in interstate commerce.³⁵

§ 489. Employers' Liability Law of 1908.

In order to meet the constitutional objections raised by the Supreme Court to the act of 1906, Congress in 1908 enacted a measure similar to the earlier law except that its provisions are expressly confined to actions growing out of injuries or deaths to persons while actually engaged in the carrying on of interstate commerce.³⁶

In *Mondou v. N. Y., N. H. & Hartford Ry.*,³⁷ this liability law of 1908,³⁸ was declared constitutional as being in regulation of interstate commerce, the court declaring it to be a settled proposition "that Congress in the exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those regulations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

That the provisions of the law did have a direct relation to efficient and safe operation of the interstate railway carriers, the court declared itself convinced. "The natural tendency of the changes [in the common law] described," said the court, "is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

³⁵ The law in a later case was held valid as to the District of Columbia, and inferentially as to the Territories. *El Paso & Northeastern Ry. Co. v. Gutierrez* (215 U.S. 87).

³⁶ 35 Stat. at L. 65.

³⁷ 223 U. S. 1.

³⁸ As amended April 5, 1910, 36 Stat. at L. 291.

The act of 1908 was also declared by the court not to operate as a denial of due process of law. This phase of the question will receive consideration in the chapter dealing with Due Process of Law.³⁹

In *New York Central R. Co. v. Winfield*,⁴⁰ the doctrine of earlier cases was reaffirmed that the Federal Liability Act is so exclusive in its intended operation as to prohibit the States from legislating in the premises. "No part of the Act," said the court, "points to any purpose to leave the States free to require compensation where the Act withholds it. . . . That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court."⁴¹ In this case it was held that a person, injured while engaged in interstate commerce, could not obtain an award under a New York law which provided for cases in which an employee was injured without fault on the part of the employer railroad,—a right to damages which was not recognized by the Federal law, which provides that the right to recover damages shall exist only when the injury results in whole or in part from negligence on the part of the employer. The doctrine thus declared was reaffirmed by the court in *St. Louis, I. M. & S. R. Co. v. Hesterly*.⁴²

§ 490. Longshoremen's and Harbor Workers' Compensation Act of 1927.

This act will be discussed in connection with the admiralty jurisdiction of the United States.⁴³

§ 491. Federal Employees' Compensation Legislation.

The Federal Government has legislated with regard to the compensation to be paid to certain of its own employees because of injuries received by them in the course of their employment, but this legislation has rested, for its constitutional validity, not upon the commerce power, but upon its general implied right to fix the terms of compensation, etc., of its own employees. Having the constitutional right to exercise a power or function, the Federal Government has, of course, the implied right to establish and operate the administrative or other governmental machinery for exercising the power or function, and this machinery, or necessity, includes the appointment of the persons who are to operate, and to fix the terms of their employment, that is, their hours of labor and other conditions of

³⁹ See *post*, Chapter CI.

⁴⁰ 244 U. S. 147.

⁴¹ Citing *Missouri, K. & T. R. Co. v. Wulf* (226 U. S. 570); *Michigan C. R. Co. v. Vreeland* (227 U. S. 59); *North Carolina R. Co. v. Zachary* (232 U. S. 248).

Justice Brandeis dissented in a long opinion in which he reviewed the general nature and purpose of employers' liability acts, and the respective spheres, as he viewed them, of Federal and State legislation.

⁴² 228 U. S. 702. See also *Seaboard R. Co. v. Horton* (233 U. S. 492).

⁴³ See *post*, § 490.

service, their compensation, and, included therein, their right to compensation including indemnities for accidents, sick relief, and pensions in cases of disability or retirement because of age or for other reasons.⁴⁴

In 1908 Congress provided for limited relief, in cases of death or disability due to accidents received in the course of their employment, to employees engaged in certain employments deemed to be of a dangerous character.⁴⁵

By the act of 1916,⁴⁶ together with amendments thereto, compensation in cases of death or accident received in the course of their employment, is provided for all employees (or their dependents) of the United States Government.⁴⁷

The act is administered by a Commission of three appointed by the President, by and with the advice and consent of the Senate.

The constitutionality of this legislation has not been questioned.

§ 492. Interstate Commerce Act of 1887.

As early as 1880, the Federal Senate exhibited its concern in the railway situation, especially in the Middle West, by appointing a committee of investigation, known as the Windom Committee. No concrete legislative results followed from the work of this Committee, but, the evils of discriminatory rates continuing to increase, the Senate, in 1886, appointed another Committee,—the Cullom Committee. Largely as a result of the work of this Cullom Committee, Congress, in 1887, enacted the Interstate Commerce Act, which was approved by the President on February 4.⁴⁸

This statute marked the beginning of a new era with regard to the exercise by the United States of its regulatory powers under the Commerce Clause of the Constitution. The act is still in force, but has been repeatedly amended or supplemented for the purpose of giving to the Commission which the act created wider and more effective authority. As thus amended and supplemented by other congressional statutes, the act now (1928) requires more than two hundred pages of fine print for its statement.

§ 493. Development of the Functions of the Interstate Commerce Commission.

The provisions of the act of 1887, as originally passed, were made applicable to carriers "engaged in the transportation of passengers or

⁴⁴ As to the constitutionality of *pensions*, see *post*, § 1151.

⁴⁵ Act of May 30, 1908, 35 Stat. at L. 556.

⁴⁶ September 7, 1916, 39 Stat. at L. 742.

⁴⁷ There have been a number of acts relating to special services of the government which it is not necessary here to specify. See G. A. Weber, *The Employees' Compensation Commission*, published in 1922 by the Institute for Government Research (Washington, D. C.).

⁴⁸ 24 Stat. at L. 378.

property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country." The term railroad, as used in the act was declared to include all bridges or ferries used in connection therewith.

It is to be noted that the act did not relate to commerce wholly by water even though interstate in character and competitive with that carried on by land or partly by land and partly by water.

As regards the regulatory features of the act, these, as summarized in the first annual report of the Interstate Commerce Commission (p. 10), were as follows:

"All charges made for services by carriers subject to the Act must be reasonable and just. Every unjust and unreasonable charge is prohibited and declared to be unlawful.

"The direct or indirect charging, demanding, collecting, or receiving for any service rendered, a greater or less compensation from any one or more persons than from any other for a like and contemporaneous service, is declared to be unjust discrimination and is prohibited.

"The giving of any undue or unreasonable preference, as between persons or localities, or kinds of traffic, or the subjecting any one of them to undue or unreasonable prejudice or disadvantage, is declared to be unlawful.

"Reasonable, proper, and equal facilities for the interchange of traffic between lines, and for the receiving, forwarding, and delivering of passengers and property between connecting lines is required, and discrimination in rates and charges as between connecting lines is forbidden.

"It is made unlawful to charge or receive any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a larger distance over the same line in the same direction, the shorter being included within the larger distance [The Long and Short Haul Clause].

"Contracts, agreements, or combinations for the pooling of freights of different and competing railroads, or for dividing between them the aggregate or net earnings of such railroads or any portion thereof, are declared to be unlawful [The Anti-Pooling Clause].

"All carriers subject to the law are required to print their tariffs for the transportation of persons and property, and to keep them for public inspection at every depot or station on their roads. An advance in rates is not to be made until after ten days' public notice, but a reduction in rates may be made to take effect at once, the notice of the same being immediately and publicly given. The rates publicly notified are to be the maximum as well as the minimum charges which can be collected or received for the services respectively for which they purport to be established.

"Copies of all tariffs are required to be filed with this Commission, which is also to be promptly notified of all changes that shall be made in the same. The joint tariffs of connecting roads are also required to be filed, and also copies of all contracts, agreements, or arrangements between carriers in relation to traffic affected by the Act.

"It is made unlawful for any carrier to enter into any combination, contract or agreement, express or implied, to prevent, by change of time, schedules, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination."

By subsequent legislation the act of 1887 has been made to apply to "the transportation of oil or other commodity, except water and natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water"; and to "the transmission of intelligence by wire or wireless"; and the term "common carrier", as used in the act, is declared to include "all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless, express companies, sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire."⁴⁹

The term "railroad" is now declared to include "all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road used by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property."

The term "transportation" is declared to include all such services as refrigeration, elevation, receipt and delivery of the goods transported, and all services in connection therewith.

§ 494. The Interstate Commerce Commission.

For the enforcement and administration of its provisions, the act of 1887 created a Commission composed of five members, to be appointed

⁴⁹ As to whether certain pipe-line companies could properly be treated as common carriers, see 432.

by the President with the advice and consent of the Senate, with six-year terms. By later legislation the Commission has been enlarged to eleven members and their terms of office increased to seven years. Their annual compensation is now \$12,000.

From time to time the enforcement and administration of additional legislative requirements with regard to interstate commerce have been imposed upon the Interstate Commerce Commission.

In 1893 was enacted by Congress the first of a series of laws with regard to the employment by interstate commercial carriers of devices and methods for the prevention of accidents; for example, the use of automatic couplers, continuous systems of heating, the adoption of the "block" system in the running of trains, etc.

By act of June 1, 1898, the Chairman of the Commission was directed to attempt the settlement, through mediation and conciliation of labor controversies involving interstate commerce, and, in the event of failure to secure settlement by such means, to try to bring about arbitration of the controversies according to methods prescribed in the act.⁵⁰

In 1906 Congress provided that, after May 1, 1908, it should be unlawful for railroads to transport in interstate commerce any commodity, other than timber or its manufactures, which they might own in whole or in part, or in which they might have any interest, direct or indirect, except such commodities as might be necessary or intended for their own use as common carriers. This so-called "Commodities Clause" had for its chief purpose the separation of the railroads from the coal mines which a number of them owned or controlled.⁵¹

§ 495. Express Rates.

In 1917 the Commission made a comprehensive study of the rates and operating practices of companies doing an interstate express business, and, founded thereupon, promulgated orders establishing through routes and joint rates to take the place of the through rates which the companies had previously charged, made up of the sum of local rates. Rules were also established by the Commission tending to prevent the practice of double collections of charges, that is, from both consignors and consignees. Furthermore, the method of computing rates by dividing the country into zones was put into force. "This system of rate-making, which simplifies the tariffs for both the companies and the public, may be set down as the most important piece of constructive rate-making that the Commission has accomplished. It has now been adopted for intrastate traffic by practically all the States and is being gradually extended to include commodity tariffs as well as class rates."⁵²

⁵⁰ 30 Stat. at L. 424.

⁵¹ For cases construing and applying this law, see *post*, § 514.

⁵² Dixon, *Railroads and Government*, p. 59.

§ 496. Compensation to Railroads for Carrying Mail.

By act of July 28, 1916,⁵³ the Commission was directed to prescribe the rules in accordance with which the railroads should be compensated for carrying the mails and for all services by them in connection therewith.⁵⁴

§ 497. Accounting and Valuation.

The Commission has performed a most valuable and difficult work in the matter of prescribing the manner in which the interstate carriers shall keep and report their accounts, and of making a valuation of railway properties.⁵⁵

§ 498. Other Duties of the Commission.

A great variety of other duties have been laid upon the Commission with regard to the orders they may issue to carriers in regard to the doing of an interstate transportation business, which it is not practicable here to specify. A considerable number of them, however, will receive incidental mention in connection with the discussion of cases decided in the Supreme Court with regard to the legislative and constitutional powers of the Commission.

§ 499. Development of the Power of the Interstate Commerce Commission to Enforce Its Orders.

In the sections which have immediately preceded a statement has been made of the manner in which the functions of the Commission have been increased since its establishment in 1887. There will now be considered the authority which the Commission has to secure the information needed by it, in order to discharge its duties, and the means it has for securing an enforcement of its orders. It will be found that during the early years of its existence, and largely due to decisions of the Supreme Court, the Commission was without the legal means of exercising effectively the regulatory jurisdiction confided to it by law, but that, by later legislation, this administrative weakness has been corrected.

§ 500. Compelling Testimony.

In 1892, in the case of *Counselman v. Hitchcock*,⁵⁶ the Supreme Court held that the Commission could not compel a witness to give testimony

⁵³ 39 Stat. at L. 412.

⁵⁴ See the opinion of the Commission of December 23, 1919, 56 I. C. C. 1.

⁵⁵ The act imposing this latter duty upon the Commission was that of March 1, 1913, and amended by acts of February 28, 1920, 41 Stat. at L. 456, and June 7, 1922, 42 Stat. at L. 624. See Interstate Commerce Act, Sec. 19a. For a brief statement of the work of the Commission in connection with the valuation of railways, see Dixon, *Railroads and Government*, pp. 69-76.

⁵⁶ 142 U. S. 547.

which might tend to incriminate himself. This decision, it was seen, would seriously interfere with the power of the Commission to obtain the information needed by it in order effectively to exercise its regulatory functions. By act of February 11, 1893,⁵⁷ therefore, Congress provided that no person should be excused from testifying or producing documents and other evidence upon the ground that he would thus tend to incriminate himself, but that he should not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might thus be compelled to testify or produce evidence.

This act was held constitutional by the Supreme Court in the case of *Brown v. Walker*.⁵⁸

By act of June 30, 1906⁵⁹ it was provided that the immunity, mentioned above, "shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." Though granted immunity from subsequent criminal prosecution with reference to the matters thus testified to, it was provided that the witness should be liable for perjury committed when so testifying.⁶⁰

§ 501. Enforcement of Rulings and Orders of the Commission.

During the early years of the existence of the Commission the processes provided for securing an enforcement of its rulings or orders were very unsatisfactory. During these years the usual proceedings were as follows: A complaint having been made to the Commission by a shipper, a hearing would be had and a decision rendered, which, however, the carrier would obey or not as it might see fit. If the carrier did not obey, the Commission was obliged to apply to a Federal court for the issuance of an injunction or mandamus to compel obedience to the order. Upon such application a trial would be had in which the courts felt themselves empowered, and even obligated, to review the entire facts of the controversy, and, based upon such a review, to issue its own decree in the premises. In these judicial proceedings the findings of fact by the Commission were given only a *prima facie* value.⁶¹ Nor did the courts hold themselves bound to consider only the evidence that had been submitted to the Commission. They asserted and exercised the right to approach the matter *de novo* and to receive and consider such other and further testimony as the parties

⁵⁷ 20 Stat. at L. 443.

⁵⁸ 161 U. S. 591.

⁵⁹ 34 Stat. at L. 798.

⁶⁰ For further discussion of the inquisitorial powers of the Interstate Commerce Commission, see *Harriman v. Int. Com. Com.* (211 U. S. 407); and *Smith v. Int. Com. Com.* (245 U. S. 33).

⁶¹ See especially *Kentucky and Indiana Bridge Co. v. Louisville and Nashville R. R.* (37 Fed. 137).

might see fit to introduce. From this judicial decree an appeal might be taken which could be pursued to the Supreme Court of the United States. Two results followed: "There was intolerable delay in the redress of grievances; and, in the second place, all definitive proceedings were postponed until the case had gone on appeal to the courts. In other words, the Commission, instead of being a coördinate body with the courts, was reduced to an entirely subordinate position. Its function became merely to institute proceedings, and thereafter to appear as a complainant before the other tribunals competent alone to decide the case."⁶²

§ 502. Rate-Making Power of the Commission Denied.

The greatest blow to the Commission, came, however, when the Supreme Court held that it had no power to fix the rates which interstate carriers were to charge for their services.

Whether or not it had been the intention of Congress to give this power to the Commission is not certain, but the Commission very soon after its establishment acted upon the assumption that it had the authority; that is, the power not only to investigate as to the reasonableness of existing charges, but to declare what rates were reasonable and to be charged thereafter. The Commission did not claim, however, a general *ex proprio motu* rate-making power. It asserted only the right to take action in specific instances upon complaint having been made to it as to unreasonableness or unfairness of existing rates.

The first case in the Supreme Court throwing doubt upon this rate-making power of the Commission was that of *Cinn., N. O. & Texas Pac. Ry. v. Interstate Commerce Commission*,⁶³ decided in 1896. In this case the point was very briefly argued in the opinion, the court contenting itself with saying: "Whether Congress intended to confer upon the Interstate Commerce Commission the power itself to fix rates was mooted in the courts below and is discussed in the briefs of counsel. We do not find any provision of the Act that expressly or by necessary implication confers such a power. It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate in a given case depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable."

Of this statement by the court it is to be observed that it left it uncertain whether the court was referring to rates fixed after the Commission had

⁶² Ripley, *Railroads, Rates and Regulations*, Vol. I, p. 460.

⁶³ 162 U. S. 184.

found, upon complaint, that the rates in force were unreasonable, or to the fixing of rates by the Commission in advance of such complaint and hearing. If the latter was meant, the statement was clearly *obiter*.

In *Interstate Commerce Commission v. Cinn., N. O. & Texas Pac. Ry.*⁶⁴ decided in 1897, and sometimes spoken of as the *Maximum Freight Rate* case, the rate-making power of the Commission was carefully considered and denied. The inquiry as to whether rates which have been charged are reasonable, the court declared to be a judicial act; the prescribing of rates to be charged in the future, it declared to be a legislative act. After referring to the large amounts of property involved, and to the "supreme delicacy" of this legislative function, the court said: "That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language." No clear and direct delegation of the power being found, the court declared itself convinced "that under the Interstate Commerce Act the Commission has no power to prescribe the tariff of rates which shall control in the future, and, therefore, cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed."

§ 503. Long and Short Haul Clause of the Interstate Commerce Act Practically Nullified.

The Commission had received a body blow from the Supreme Court in the *Maximum Freight Rate* case, but this did not mark the end of the injuries to its powers which it was to suffer. In the next year, in the case of *Interstate Commerce Commission v. Alabama Midland Ry.*⁶⁵ the court practically nullified the long and short haul clause of the act of 1887 by overruling the holding of the Commission that the existence of competition between rival routes could not be held to constitute that dissimilarity of circumstances and conditions which would justify the charging of a greater compensation in the aggregate for the transportation of passengers or of like kinds of property for a shorter than for a longer distance over the same line in the same direction.⁶⁶ The court endeavored to guard the undue application of its holding by saying that it was not to be understood as declaring that in all cases the existence of competition would relieve the carrier from the restraints of Sections 3 and 4 of the act, but that "these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration." The actual effect of the decision as it appeared to many was, however, that stated by Justice Harlan in his dissenting opinion in which he said: "Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body for all practical purposes. . . . [The

⁶⁴ 167 U. S. 479.

⁶⁵ 168 U. S. 144.

⁶⁶ Sec. 4 of the act of 1887.

Commission] has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character."

§ 504. The Elkins Act of 1903.

In response to public dissatisfaction growing out of the rapid consolidation of railways and the rise of railway rates that had taken place since 1900, and to the demands of prominent railway men themselves who appreciated the losses of revenue accruing to their roads from rebating and rate-cutting, Congress, in 1903, enacted the Elkins law amending and strengthening the Interstate Commerce Act of 1887, by providing that the penalties therein provided for should apply to the railway companies themselves and not merely to their officers, and that the published rates should be deemed the standard of lawfulness and that departures therefrom should be deemed misdemeanors.⁶⁷

A further change effected in the law of 1887 by the Elkins Act was with regard to modes of proof of violations of the act. As construed by the courts, the original act required the Commission to show not only that secret and preferential rates had been given by a carrier, but that other shippers of like and contemporaneous shipments had paid rates higher than the secret and preferential ones. That is, it had been necessary to prove discrimination as a fact between shippers who, by reason of receiving the same services, were entitled to the same rates. The practical result of this requirement had been, as the Commission said in its Seventeenth Annual Report,⁶⁸ to render prosecutions extremely difficult, if not impossible, because the necessary evidence was rarely obtainable.

Other provisions of the Elkins law were those which permitted the Commission to include as parties in its proceedings, in addition to the carriers themselves, all persons interested in, or who would be affected by, the proceedings; and which conferred jurisdiction upon the Circuit Courts of the United States to restrain departures from published rates or any forbidden discriminations by injunction or other appropriate writ—a writ that was to be enforceable against interested parties as well as the carrier.

The constitutionality of the Elkins Act as regards its imposition of liability upon the carrier companies for acts of their employees or officers in violation of the Interstate Commerce Act, was upheld by the Supreme Court in *N. Y. Central & H. R. Ry. v. United States*.⁶⁹

⁶⁷ The act abolished the penalty of imprisonment which, in 1889, had been added to those provided for in the act of 1887.

⁶⁸ Dated December 15, 1903, p. 8.

⁶⁹ 212 U. S. 481.

§ 505. Expediting Act.

By act of February 11, 1903,⁷⁰ as amended by act of June 25, 1910,⁷¹ it was provided that upon certificate being filed by the Attorney General of the United States that an equity case is of general public importance, it "shall be given precedence over others and in every way expedited."⁷²

§ 506. The Hepburn Act of 1906—The Commission Given Rate-Making Powers.

By the so-called Hepburn Act of June 29, 1906,⁷³ Congress gave to the Interstate Commission, by express provision, the right, after a full hearing upon a complaint or after an investigation made by the Commission on its own initiative, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged."⁷⁴

The Hepburn Act also extended the field of Federal regulation to include pipe lines, express companies and sleeping-car companies. Transportation was defined as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Also, switches, spurs, terminals, etc., were declared to come within the scope of the Federal regulations. It should be noted, however, that, though transportation partly by rail and partly by water was included, transportation wholly by water was not included.

Imprisonment as one of the penalties that might be imposed for violations of the act was again provided for.

The provisions regarding the uniformity and publicity of carriers' accounts were made more mandatory.

It was also at this time that the number of Interstate Commerce Commissioners was increased to seven, and their terms of office made seven years.

The act also contained what came to be termed the "Commodities Clause," which declares it unlawful for any railroad to transport in inter-

⁷⁰ 32 Stat. at L. 823.

⁷¹ 36 Stat. at L. 854.

⁷² This provision was made to apply as well to cases arising under the Anti-Trust Act of 1890 and other acts of like purpose.

⁷³ 34 Stat. at L. 584.

⁷⁴ As amended by acts of June 18, 1910 (36 Stat. at L. 539) and February 28, 1920 (41 Stat. at L. 484), the rate-fixing authority now reads: "to determine and prescribe what will be the just and reasonable individual or joint-rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto,) and what individual or joint classification, regulation, or practice is or will be fair and reasonable, to be thereafter followed."

state or foreign traffic "any article or commodity other than timber and the manufactured products thereof, mined or produced by it, or under its authority or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." ⁷⁵

§ 507. The Right of Congress to Delegate its Rate-Making Power to a Commission.

That a legislature may delegate to a commission as its agent the application to specific cases of a rule legislatively declared, is established. There would thus seem to be no constitutional difficulty in Congress laying down certain principles of railway rate regulation, and intrusting to a commission or other administrative body the task of determining the rates which conform to these requirements. If, therefore, it be desired that interstate railway rates shall be fixed by Federal authority, it is clear that it is not necessary that Congress should itself determine each specific rate. Congress must, however, lay down the rule or rules by which the body to which this function is delegated shall be guided.

By the act of June 29, 1906, it is declared by Congress that "charges for interstate transportation of passengers as property shall be just and reasonable;" and to the Interstate Commerce Commission is given the authority, after having decided that a rate in force is not a proper one, "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged." Thus the only rule for determining the rates which Congress has declared for the guidance of the Commission in the fixing of specific rates is that they shall be just and reasonable. The determination of when these very general requirements are met by a rate is left, in each case, to the judgment of the Commission. It might seem open to question whether Congress has not in fact really delegated to the Commission the legislative function of fixing rates according to its own judgment and not according to principles legislatively determined, but the courts have found no difficulty in sustaining this delegation of authority. This will appear in the sections which follow in which are considered the powers of the Interstate Commerce Commission. ⁷⁶

§ 508. Court Review of Orders of the Commission.

A very important matter to be considered by those who framed and enacted the Hepburn Law was as to the power of the courts to review the orders of the Interstate Commerce Commission; that is, should they have

⁷⁵ For interpretations and applications which this clause has received, see § 819.

⁷⁶ As to the conclusiveness of such determinations, see § 518.

the broad right to review the orders in all respects, or only as to points of law that might be involved; and, pending final judicial decision, should they have the right by writs of injunction to suspend the enforcement of the orders? In this connection, arose the constitutional question whether Congress had the power, should it desire to exercise it, to limit the exercise of the courts' powers in these respects. Upon these points there was an extended discussion in and out of Congress, and, in result, it was provided that the courts should have the unrestricted power to hear and determine all suits against the Commission, to set aside, annul, or suspend any order or requirement of the Commission. This was thought, at the time, to be a victory for those who had argued for a "broad review" by the courts, but, as later appeared when the matter came before the Supreme Court, the courts claimed only a "narrow" power of review.

In *Interstate Commerce Commission v. Illinois Cen. R. Co.* (Car Distribution case),⁷⁷ an action to set aside an order of the Commission directing certain railroads to make allotments of its cars to coal mines, the court, after referring to Section 4 of the act of 1906, which provided that all orders of the Commission, except orders for the payment of money, should take effect within thirty days unless suspended or set aside by a court of competent jurisdiction, said: "Beyond controversy, in determining whether an order of the Commission shall be sustained or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous ones, viz., whether even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power (citing cases). Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

Examining, then, the statutory power of the Commission to issue the order complained of, and deciding that it had the power, the court said

⁷⁷ 215 U. S. 452.

that it could not consider the wisdom of Congress in granting this authority, and that, therefore, the decree of the lower court, which had enjoined the order of the Commission, should be reversed.

In another case, decided shortly after the *Car Distribution* case,⁷⁸ the court, however, held that it would not consider itself conclusively bound as to findings of facts by the Commission upon which its statutory competence was based. In this case the Commission had issued an order establishing certain through routes and joint rates. The exercise of this right is conditioned by the act upon the non-existence of any reasonable or satisfactory through route independently of the Commission's order, and the Commission had found that no such through route existed. As to this finding the court said: "It is urged that this condition is addressed only to the opinion of the Commission, and cannot be re-examined by the courts as a jurisdictional fact. The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers."⁷⁹ But even in such a case there may be a difference of opinion, and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense.⁸⁰ We are of opinion, then, that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt, in complex and delicate cases great weight, at least, would be attached to the judgment of the Commission."

Before this the court had held, in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*⁸¹ that the courts were without power, in the first instance, to deal with actions brought to recover unreasonable freight charges which had been paid, when such charges had been in accord with the published tariffs of the carriers, and that the shippers, in such cases, were obliged first to institute proceedings before the Commission in order to determine the reasonableness of the charges in question.

Section 9 of the Interstate Commerce Act provides that any persons claiming to be damaged by any common carrier subject to the act may make complaint to the Commission or may bring suit in any district or Circuit Court of the United States of competent jurisdiction for the recov-

⁷⁸ *Interstate Commerce Commission v. Northern Pac. R. Co.* (216 U. S. 538).

⁷⁹ *Citing Fauntleroy v. Lum* (210 U. S. 230).

⁸⁰ *Citing Interstate Commerce Commission v. Ill. Cen. R. Co.* (215 U. S. 452).

⁸¹ 204 U. S. 426.

ery of damages. As to this provision, the court said that its application was to be confined to the redress of such wrongs as, consistently with the context of the act, could be redressed by the courts without previous action by the Commission.⁸²

In this and subsequent cases⁸³ the Supreme Court showed that it was of opinion that questions of an essentially administrative and factual character should be decided, in the first instance at least, by the Commission.

In *Interstate Commerce Commission v. Union Pac. R. Co.*⁸⁴ upon an appeal brought by the Commission from a decree of a lower court enjoining certain reductions which the Commission had ordered in rates filed with it by the carriers concerned, the Supreme Court made the following statement with regard to the finality and conclusiveness of the Commission's orders: "In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Interstate Commerce Commission v. Illinois C. R. Co.*, 215 U. S. 470; *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission v. Northern P. R. Co.*, 216 U. S. 544; *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S. 146.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted

⁸² See also *B. & O. R. Co. v. Pitcairn Coal Co.* (215 U. S. 481); *Robinson v. B. & O. R. Co.* (222 U. S. 506).

⁸³ *E. g.*, *Penn. R. Co. v. Int. Coal Co.* (230 U. S. 184); *Mitchell Coal & Coke Co. v. Penna. R. Co.* (230 U. S. 247); *Morrisdale Coal Co. v. Penna. R. Co.* (230 U. S. 304).

⁸⁴ 222 U. S. 541.

as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In the instant case it had been contended by the carriers that the order complained of had been made without any evidence that the previous rate had been an unreasonable one. The court held that the findings of fact by the Commission should be deemed conclusive. It was therefore ordered that the decree of the lower court enjoining the Commission's orders should be reversed.

In *Interstate Commerce Commission v. United States ex rel. Humboldt Steamship Co.*,⁸⁵ the court held that when the Commission had refused to take jurisdiction of a petition alleging a violation of the Interstate Commerce Act, its ground of refusal being an erroneous interpretation of law,⁸⁶ mandamus might issue to compel it to act.⁸⁷

In *Penna. R. Co. v. International Coal Mining Co.*⁸⁸ the court, with reference to the reasonableness of rates fixed by the Commission said: "The determination of such issues involves a comparison of rates with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body [the Interstate Commerce Commission], so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

None of these considerations, it was held, operated to defeat the court's jurisdiction in the instant case, the case being one brought under Section 8 of the Interstate Commerce Act which specifically provides that a carrier violating the act shall be liable in damages to parties injured thereby.

In *Penna. R. Co. v. Puritan Coal Mining Co.*,⁸⁹ suit had been instituted in a State court for damages caused by the failure of the railroad to furnish cars needed for the transportation of the plaintiff's coal. Upon error, the Supreme Court held that, by the act of 1887, the jurisdiction of such a cause of action had been vested exclusively in the Interstate Commission

⁸⁵ 224 U. S. 474.

⁸⁶ The petition related to railways in Alaska, and the Commission, erroneously, the court held, had declared that Alaska was not a Territory of the United States, and therefore, that the railways in it did not come within the operation of the Interstate Commerce Act.

⁸⁷ See also *United States v. Interstate Commerce Commission* (246 U. S. 638).

⁸⁸ 230 U. S. 184.

⁸⁹ 237 U. S. 121.

and the Federal courts. However, the court declared, the act did not supersede the jurisdiction of the State courts in cases which did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal courts had been made exclusive. The court, however, added the following explanation or qualification to this proposition: "It must be borne in mind that there are two forms of discrimination,—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Section 9 [of the Act of 1887]. But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called upon to decide a mere question of fact as to whether the carrier has violated the rule to the plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal courts." ⁹⁰

In *Virginia R. Co. v. United States*,⁹¹ a suit brought to enjoin the enforcement of an order of the Interstate Commerce Commission, upon the ground that the finding by the Commission that there had been unjust discrimination by the railway company had been an erroneous one, the court said: "There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law." ⁹²

There is no question, however, that, should the Commission issue an

⁹⁰ See also *Illinois Cen. R. Co. v. Mulberry Hill Coal Co.* (238 U. S. 275).

⁹¹ 272 U. S. 658.

⁹² Citing *Western Paper Makers' Chemical Co. v. United States* (271 U. S. 268).

order clearly unsupported by the evidence, the order can and will be set aside by the courts.⁹³

§ 509. Mann-Elkins Act of 1910.

By the so-called Mann-Elkins Act of June 18, 1910,⁹⁴ power was granted to the Commission to suspend changes in rates, contemplated by carriers, until their reasonableness should be determined, upon the carriers being imposed the burden of proof of such reasonableness; the "long and short haul" clause was revived but with the provision as to "substantially similar circumstances and conditions" omitted; authority was given to the Commission to regulate routings; a Court of Commerce was created;⁹⁵ and formal legalization was given to the rule which the Commission had for many years followed that a through rate should not exceed the aggregate of local rates over the same line; and, finally, that no railroad, having once reduced its rate in order to meet competition with a water route might thereafter increase the rate unless and until the Commission should find such rate justified by changed conditions other than the elimination of the water competition.⁹⁶

§ 510. The Commerce Court.

As this tribunal is no longer in existence, it will not be necessary to say more than a few words regarding it.

As has been already said, the court was created by the Mann-Elkins Act of June 18, 1910. Its establishment was due to the desire to expedite the trial of commerce cases, and to secure a tribunal the judges of which would be, or would become, trained in technical matters of interstate commerce regulation.

The court was composed of five judges who were to be designated from time to time by the Chief Justice of the United States for periods of five years from among the circuit judges of the United States. The court was to hold its regular sessions in Washington, D. C., but might exercise its powers, as might its clerks and marshals, anywhere in the United States.

As provided in the statute the court had transferred to it all the jurisdiction previously possessed by the Circuit Courts of the United States of cases of the following kinds:

"1. All cases for the enforcement, otherwise than by adjudication and

⁹³ For *dicta* as to this see *New England Divisions Case* (261 U. S. 184); *Interstate Commerce Commission v. Union Pac. R. Co.* (222 U. S. 541); and *Florida East Coast R. Co. v. United States* (234 U. S. 167).

⁹⁴ 36 Stat. at L. 539.

⁹⁵ As to this short-lived Federal tribunal, see the next section.

⁹⁶ This provision was of course intended to meet the practice by railways of reducing their rates until the water lines were driven out of business, and then recouping themselves by raising their rates to an extent equal to or beyond what they originally were.

collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"2. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"3. Such cases as by section 3 of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February 19, 1903, are authorized to be maintained in a Circuit Court of the United States.

"4. All mandamus proceedings as under the provisions of section 20 or section 23 of the Act entitled 'An Act to regulate commerce,' approved February 4, 1887, as amended, are authorized to be maintained in the Circuit Court of the United States."

Over these classes of cases the jurisdiction of the Commerce Court was made exclusive.

From the final judgments or decrees of the court, appeals lay to the Supreme Court of the United States in like manner as they had lain from the Circuit Courts. Prosecution of these appeals was transferred from the Interstate Commerce Commission to the Department of Justice of the United States, but the Commission or other interested parties had the right to appear and be represented by counsel.

The reason for the short existence of the court was the manner in which it used its jurisdiction to obstruct the exercise by the Interstate Commerce Commission of its powers as granted by law and as sustained by the Supreme Court.

It has already been pointed out that for nearly twenty years after its establishment the findings of the Commission had been given only a prima facie value by the lower Federal courts, and that the courts had not, in the hearings before them, limited themselves to the evidence that had been adduced before the Commission. This practice had been criticized by the Supreme Court in the case of *Cinn., N. O. & Texas Pac. Ry. v. Interstate Commerce Commission*,⁹⁷ and, in 1906, Congress had provided that "if upon such hearing as the court may determine to be necessary, it appears that the order (of the Commission) was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order." Furthermore, in January, 1910, the Supreme Court, in the case of *Interstate Commerce Commission & Ill. Cen. R. R.*,⁹⁸ had refused to enter into the merits of the controversy involved, and had held that it should limit itself to determining whether the Commission had acted within its statutory powers and in a constitutional manner. The Commerce Court, however, repeatedly asserted its right to enter into the merits of the controversies involved in the cases

⁹⁷ 162 U. S. 184.

⁹⁸ 215 U. S. 452.

brought before it, although it was invariably overruled by the Supreme Court for so doing.⁹⁹

Largely due to the friction thus aroused the Commerce Court was abolished by Congress, in 1913, and its judges transferred to the circuits.¹⁰⁰

§ 511. Panama Canal Act.

By Section 11 of the Panama Canal Act of August 24, 1912,¹⁰¹ it was provided that from and after July 1, 1914, it should be unlawful for any railroad or other carrier subject to the Interstate Commerce Act to own, lease, operate, control, or have any interest whatsoever, by stock ownership or otherwise, directly, or indirectly through any holding company, or by stockholders or directors in common, or in any other manner, in any common carrier by water operated through the Panama Canal or elsewhere with which such railroad or other carrier does or might compete for traffic on any vessel carrying freight or passengers upon such water route or elsewhere with which such railroad or other carrier competes or might compete. The section further provided:

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. . . .

"If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, or reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order,

⁹⁹ See, for example, *Interstate Commerce Commission v. Goodrich Transit Co.* (224 U. S. 194). See also *Procter & Gamble v. United States* (225 U. S. 282), for another case in which the assumption of power by the Commerce Court was declared unwarranted by the Supreme Court.

¹⁰⁰ October 22, 1913, 38 Stat. at L. 219. F. H. Dixon, in his *Railroads and Government*, p. 51, speaking of the Commerce Court says: "It performed a valuable service in strengthening the law at many points, and it was by no means always in opposition to the Commission nor favorably inclined to the corporate point of view. It was unfortunate that the Court chose to interpret its authority in such fashion as to bring it into conflict with the Commission and to bring down upon it the condemnation of the Supreme Court. Whether this was due to hostility to the Commission, to a desire to create for itself a place in the judicial system, or to a constitutional inability or unwillingness to surrender final authority in matters of fact, is difficult to say. Probably it was a combination of all three."

¹⁰¹ 37 Stat. at L. 560.

extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen."

§ 512. Parcel Post.

The act of August 24, 1912,¹⁰² further provided for the establishment of a Parcel Post, and declared: "The classification of articles mailable as well as the weight limit, the rates of postage, zone or zones and other conditions of mailability under this act, if the Postmaster General shall find on experience that they or any of them are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the receipts of the revenue therefrom, he is hereby authorized, subject to the consent of the Interstate Commerce Commission after investigation, to reform from time to time such classification, weight limit, rates, zone or zones or conditions, or either, in order to promote the service to the public or to insure the receipt of revenue from such service adequate to pay the cost thereof."

Acting under this provision the Postmaster General has, upon a number of occasions, applied to the Commission for its consent to make changes in rates of postage and conditions of mailability in the parcel post.

§ 513. Carmack Amendment.

By the Hepburn Act of June 29, 1906,¹⁰³ Section 7 of the act of 1887 was amended so as, *inter alia*, to provide that bills of lading or receipts should be issued to shippers, on account of shipments, and that the carrier "shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." It was also provided that this provision should not deprive the holder of such receipts or bills of lading of any remedy or right of action that he might have under existing law, and that the carrier issuing the receipt or bill of lading should have a right of recovering from any other carrier on whose lines the injury or loss might occur for such amounts as it, the original carrier, was obliged to pay because of such loss or injury.

The foregoing provisions have been generally spoken of as the "Carmack Amendment."

In *Atlantic Coast Line R. Co. v. Riverside Mills* ¹⁰⁴ it was held that this imposition of liability upon interstate carriers for the transportation upon connecting lines of property voluntarily received by the carriers thus rendered liable was within the commerce power of Congress and was not

¹⁰² 37 Stat. at L. 560.

¹⁰³ 34 Stat. at L. 584.

¹⁰⁴ 219 U. S. 186.

in violation of the Fifth Amendment. The court conceded that the effect of the act was to prevent the initial carriers from limiting their liability to its own line, but pointed out that, under American law, there is no such thing as absolute freedom of contract. "Contracts which contravene public policy cannot be lawfully made at all; and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of Government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interest. . . . Having the express power to make rules for the conduct of commerce among the States, the range of congressional discretion as to the regulation best adapted to remedy a practice found inefficient and hurtful is a wide one. If the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Constitution, and reasonably adopted to the purpose by reason of legitimate relation between such commerce and the rule provided, the question of power is foreclosed."

Whether or not Congress might compel the initial carrier to receive for transportation property which, in order to reach its destination would have to be carried over other lines than its own, and at the same time be held liable for failure of such connecting lines to transport safely and with due speed, was not involved in the case nor is it so provided in the law. As to this the court said: "This record presents no question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. We therefore refrain from any consideration of the large question thus suggested."

In *Adams Express Co. v. Croninger*¹⁰⁵ it was held that Congress had so clearly exhibited its intention to regulate the whole subject of the liability of a carrier under contracts for interstate shipments as to supersede all State regulations with reference thereto.¹⁰⁶

§ 514. "Commodities Clause" of the Hepburn Act of 1906.

This clause will be discussed in the next chapter in which will be examined the constitutional power of Congress to exclude commodities or persons from interstate and foreign commerce.

§ 515. Railway Rate Regulation.

The general power of the Government, State or Federal, to regulate the rates that may be charged by persons or corporations operating public services, or industries "affected with a public interest," is elsewhere con-

¹⁰⁵ 226 U. S. 491.

¹⁰⁶ See also *C., B. & Q. R. Co. v. Miller* (226 U. S. 513), decided at the same time as the *Adams Express Co.* case.

sidered.¹⁰⁷ It is sufficient here to say that the Federal Government has this constitutional power with reference to common carriers, subject only to the limitations imposed (1) by the requirements of due process of law, and (2) by the right of the States, so far as it is an exclusive one, to fix intrastate rates. These two limitations upon the Federal power with reference to interstate commerce will now be considered.

§ 516. Reasonableness of Rates.

As construed by the courts, the constitutional requirement that no person shall be deprived of property without due process of law operates to prevent the Federal Government from requiring carriers to charge rates so low as, under all the circumstances of each case, to deprive the carrier of a reasonable return for the services rendered by it. This statement perhaps needs limitation, or, at any rate, explanation, for the reasonableness of rate is determined not only by the interests of the carrier, but by those of the public also, and, where there is a conflict between the two, the public interests take the precedence, and thus, in certain cases, a rate will be upheld even though it be one the effect of which will prevent the carrier from obtaining a reasonable revenue, or even any net revenue at all, from its properties.

§ 517. General Considerations with Regard to Reasonableness of Rates.

It is established that the fact that a rate high enough to escape from the charge of being confiscatory as regards the public service corporation rendering the service is not necessarily the maximum rate which may be regarded as just and reasonable to the corporation or to the public. In other words there is, or may be, a region between rates which are confiscatory as regards the companies rendering the services, and those which are unreasonably high as regards the public, within which the rate-making authorities may exercise a certain degree of discretion. This doctrine has been declared in numerous decisions of the Interstate Commerce Commission, and has recently been definitely stated by the Supreme Court in the case of *Banton v. Belt Line Ry. Corp.*¹⁰⁸ decided in 1925. In that case the court said: "A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. The mere fact that a rate is nonconfiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate."¹⁰⁹

¹⁰⁷ See Chapter XCIV.

¹⁰⁸ 268 U. S. 413.

¹⁰⁹ Citing: *Trier v. Chicago, St. P., M. & O. R. Co.* (30 Inters. Com. Rep. 352, 355);

In further explanation of the foregoing the following distinctions are to be borne in mind: first, between the power of the courts to enforce the common law obligation of public services and of industries affected with a public interest to maintain rates which will not be extortionate, that is, which will be reasonable as regards the public; second, as to the power of the courts, according to American constitutional principles, to determine the validity of rates fixed by legislatures; and third, the function of the courts to determine the validity of rates fixed by administrative bodies which have been legislatively empowered so to do, but with the requirement that the rates thus fixed shall be just and reasonable. As regards the first of these three judicial functions, it is to be noted that it extends no further than the restraining of the services from fixing and enforcing rates which will be unduly oppressive or extortionate, that is, unreasonable, as regards the public. As regards the matter of legislatively fixed rates, the judicial function extends no further, under American constitutional principles, than to determine whether these rates are so unreasonably low as to be unjust to the companies rendering the services and thus to operate, as to them, as a taking of property without due process of law. Such legislatively fixed rates may not be questioned by the courts upon the ground that they are too high, and, therefore, oppressive to the public, for it is the peculiar province of a legislature to determine what is just and reasonable as regards the public. When, however, the courts are called upon to examine the validity of rates fixed by administrative bodies acting under a legislative authority so to do, but under a legislative mandate that the rates so fixed shall be just and reasonable, the situation is a different one. Here, the courts may, and, in fact, are obligated, when the matter is presented to them in proper form, to examine these rates not only as regards their reasonableness and justness to the companies rendering the services, but as regards also their reasonableness or justness to the public. Thus, it is competent for the courts to hold a given rate to be illegal because so low, under all the circumstances of the case, as not to yield a reasonable percentage return to the company upon the fairly valued property used by it. The courts may also hold such an administratively determined rate to be so high as to be unduly oppressive or extortionate to the public. It is, however, to be noted that, in fact, the courts have seldom, if ever, found it necessary to hold an administratively fixed rate invalid upon this last ground. However, their power so to do has been repeatedly asserted.

From the foregoing it is seen that, as already pointed out, a rate may be deemed to be a reasonable one, if fixed directly by a legislature, how-

Holmes & H. Co. v. Great Northern R. Co. (37 Inters. Com. Rep. 627, 635); Dimmitt-Caudle-Smith Live Stock Commission Co. v. Chicago, B. & Q. R. Co. (47 Inters. Com. Rep. 287, 298); Detroit & M. R. Co. v. Michigan R. Commission (203 Fed. 864, 870).

ever much it may exceed one which would satisfy the constitutional requirement that property shall not be taken without due process of law. And, even as to rates fixed under legislative mandate by administrative bodies, there is possible a considerable range of reasonableness above the confiscatory point. In other words, such an administratively fixed rate does not become unreasonable, as viewed from the standpoint of the public, because it exceeds, to some extent, the minimum that would be required in order to prevent it from being confiscatory in character.

The foregoing observations have been made because the courts, in the reasoning contained in the opinions which they have rendered, have not always taken pains to emphasize the distinctions which have been pointed out, with the result that their various declarations, considered apart from such distinctions, have not always appeared to be harmonious, or, at any rate, not easily analyzable in order to determine the exact propositions intended to be contained in them.

§ 518. Reasonableness of Specific Rates a Matter for Final Judicial Determination.

In *Munn v. Illinois* ¹¹⁰ it was held that rate-making is a distinctively legislative function, which, it was intimated, was not subject to judicial review as to its reasonableness. However, in *Spring Valley Water Works v. Schottler*, ¹¹¹ the court suggested, *obiter*, a question as to judicial relief being given in case a rate, "manifestly unreasonable," should be fixed by public authority; and, in *Stone v. Farmers' L. & T. Co. ("R. R. Commission Cases")* ¹¹² the court, speaking more decidedly, said: "It is not [to be] inferred that this [legislative] power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law." The court had not, however, definitely decided upon the doctrine that a legislative rate regulation was subject to judicial determination as to its reasonableness, for, in *Dow v. Beidelman*, ¹¹³ we find the court saying: "Without proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the Legislature is unreasonable." However, in *Chicago, Milwaukee & St. P. R. Co. v. Minnesota* ¹¹⁴ the court came squarely forth with the doctrine that: "The question of the reason-

¹¹⁰ 94 U. S. 113.

¹¹¹ 110 U. S. 347.

¹¹² 116 U. S. 307.

¹¹³ 125 U. S. 680.

¹¹⁴ 134 U. S. 418.

ableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is preëminently a question for judicial investigation, requiring due process of law for its determination." In this case, indeed, a State law was held unconstitutional which attempted to make rates fixed by a commission conclusive. This provision, the court declared, denied to the railway company its constitutional right, under the due process of law provisions of the Fourteenth Amendment, to a judicial examination as to whether the rates established were, in fact, so low as, in their operation, to be confiscatory in character.

It is true that, a little later, in *Budd v. New York*,¹¹⁵ the court called attention to the fact that what had been said in the *Chicago, Milwaukee & St. P. R.* case had no reference to cases where the rates were prescribed directly by the legislature, and therefore, suggested that the right of judicial review might not exist as to legislatively fixed rates, but, in *Reagan v. Farmers' Loan & Trust Co.*,¹¹⁶ decided the next year (1894), the court made no distinction between rates fixed by a Commission and those prescribed directly by the legislature; and, in *Smyth v. Ames*,¹¹⁷ decided in 1896, legislatively established rates were, in fact, reviewed by the court and enjoined as confiscatory in character. Since this case there has been no further question as to the constitutional power of the courts to examine rates of carriers, of other public services, and of industries affected with a public interest established by or under authority from the legislature, with a view to determining whether, by their reasonableness, they satisfy the substantive requirements of due process of law, or, by the mode in which they have been determined and prescribed and are to be enforced, whether they meet the requirements of due process of law upon its procedural side.

The courts have not, however, departed from the doctrine that the prescribing of specific rates, being distinctively a legislative function, it is not within their province or constitutional power to exercise the function. In other words, their function is limited to the review of specific legislatively fixed rates, as to their reasonableness and therefore their constitutionality, and they may not even determine what, in their opinion, would be just rates in cases in which the legislatively fixed or authorized rates are held to be unreasonable. This doctrine is so well established that it is not necessary to cite other cases than that of *Reagan v. Farmers' Loan & Trust Co.*,¹¹⁸ *Smyth v. Ames*,¹¹⁹ and *Chicago G. T. R. Co. v. Wellman*¹²⁰ in support of it. In the last-named case the court said: "The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

¹¹⁵ 143 U. S. 517.

¹¹⁶ 154 U. S. 362.

¹¹⁷ 169 U. S. 466.

¹¹⁸ 154 U. S. 362.

¹¹⁹ 169 U. S. 466.

¹²⁰ 143 U. S. 339.

§ 519. Criteria of Reasonableness as to the Public.

It has already appeared that the reasonableness of the rates to be charged by public carrier and other public services has to be viewed in two aspects: first, as they relate to the legitimate interests of the public; and second, as they relate to the interests of the companies or persons providing the services.

Examining first the question as to the requirements imposed by the interests of the public it is to be observed that, in so far as these are held to be legitimate in the premises they take precedence of the interests of the public carriers, with the result that it sometimes happens that the public interest will not permit a rate sufficient to allow the carrier or other public service to earn a net income. And especially is this so in cases in which the public service company is not able to show, affirmatively, that it is efficiently and economically organized and operated. Thus, in the comparatively early case of *Chicago & G. T. R. Co. v. Wellman* ¹²¹ we find the court saying with reference to a State law fixing railroad fares at two cents a mile: "Before the courts would declare such an act unconstitutional because the rates prevented stockholders receiving any dividend or bondholders any interest, the court must be fully advised as to what was done with the earning, otherwise by exorbitant or unreasonable salaries or in some other improper way the company might tax the public with unreasonable charges. Unless such things are negatived by proof of reasonable salaries and expenses, or if the record is silent, the legislation will be sustained." In other words, the burden of proof as to these matters is upon the public service corporation.

In *Reagan v. Farmers' Loan & Trust Co.*,¹²² in which the court sustained a restraining order of the court below forbidding a State commission from enforcing rates which it had prescribed, the court considered in considerable detail the evidence as to the financial status and operations of the carrier company, and the effect of the rates complained of, and, in result, said: "The cost of this railroad property was \$40,000,000; it cannot be replaced to-day for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates were insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possi-

¹²¹ 143 U. S. 339.

¹²² 154 U. S. 362.

ble. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. . . . The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over \$150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built the road is other than unjust and unreasonable? "

The court took care, however, to add the following caution: "It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. . . . There may be circumstances which would justify such a tariff; there may have been extravagance and needless expenditure of money; there may be waste in management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that actual cost far exceeds the present value; the road may have been unwisely built in localities where there is not sufficient business to sustain a road. Doubtless too there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road."

Declarations to the same effect are to be found in the opinion of the court in *Covington Turnpike Co. v. Sandford*.¹²³ *Inter alia*, the court, in that case, said: "The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. . . . If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

It is clear that no precise statistical or financial criteria are available to the courts or to the legislatures for determining what is a reasonable charge for services rendered by public services when that reasonableness is judged from the point of view of the interests of the public or community which is served. So far as a general rule can be laid down, it would seem, therefore, that it must be stated negatively, and to the following effect: The legislature may require that none of the carriers or other public services operating within a given general area may charge for their services more than is sufficient to give to them, taking them as a whole, a net income that will yield a reasonable return upon their properties, fairly valued, and operated with reasonable efficiency and economy. More than this cannot constitutionally be demanded in behalf of the public's interest. It is apparent, however, that, as the courts have said, this rule may, as to

¹²³ 164 U. S. 578.

roads or other public service plants which have been unwisely located, or extravagantly constructed, or built at a time when the cost of materials and work was greater than it is at the time the legislatively-fixed rate is applied, operate to deny to those roads a return upon their investments that, as a general market proposition, would be deemed a fair and reasonable one.

A rate so low as to be deemed by the courts to be confiscatory is unconstitutional, and, under the American system of constitutional jurisprudence, the legislature cannot, constitutionally, deny to the courts the jurisdiction to examine whether the legislatively fixed rate is of this character. But, as to the reasonableness of rates above the minimum that would be confiscatory, the legislature is the sole judge. Thus, in fact, the legislature may prescribe a rate or rates which, as judged by general market and industrial conditions, will permit the services concerned to earn excessive profits. In such cases the courts can interpose no veto, however unjust, in fact, the results are to the consuming public, for, by its very constitutional nature, the legislature is deemed to be the proper organ for determining public policies, that is, what the public interests require or justify. In other words, the courts are permitted to raise the issue of the public interest only when the regulated services themselves allege that a legislatively prescribed rate is not as high as it should be. The public using the public services may not question in the courts the constitutionality of the legislatively prescribed rates. Where, however, the legislature has directed an administrative agency to fix rates that are just both to the concerns supplying the services and to the public, the rates thus fixed may be attacked in behalf of the public upon the ground that, by fixing the rates unreasonably high, this legislative mandate has not been obeyed.

§ 520. Possible Distinction as to Rate Regulation by the State between Public Services Per Se and those in which the Public Has an Incidental Interest.

In *Cotting v. Kansas City Stock Yards Company*,¹²⁴ Justice Brewer raised, in an *obiter* manner, and in interrogative form, the question whether, with regard to the extent of the constitutional rate-making powers of the legislature, State or Federal, a distinction should be made between those individuals or corporations which are engaged in rendering services of a confessedly and distinctively public character, and those which have devoted their property to a use, which, though private in character, is one in which the public has an interest. As he pointed out, the cases previously decided with reference to the reasonableness of legislatively prescribed rates had dealt only with the first of these two classes of services.

¹²⁴ 183 U. S. 79.

Justice Brewer then asked whether the criteria of reasonableness which had been accepted in those cases should be applied to the second class of services, which are not primarily public, but merely affected with a public interest. It would seem that Justice Brewer believed that a distinction should be made. At least, he gave the following reasons why it should be made. He said: "Obviously there is a difference in the conditions of these cases. In the one the owner has intentionally devoted his property to the discharge of a public service. In the other he has placed his property in such a position that, willingly or unwillingly, the public has acquired an interest in its use. In the one he deliberately undertakes to do that which is a proper work for the State. In the other, in pursuit of merely private gain, he has placed his property in such a position that the public has become interested in its use. In the one it may be said that he voluntarily accepts all the conditions of public service which attach to like service performed by the State itself. In the other that he submits to only those necessary interferences and regulations which the public interest require. In the one he expresses his willingness to do the work of the State, aware that the State in the discharge of its public duties is not guided solely by a question of profit. It may rightfully determine that the particular service is of such importance to the public that it may be conducted at a pecuniary loss, having in view a large general interest. At any rate it does not perform its services with the single idea of profit. Its thought is the general public welfare. If in such a case an individual is willing to undertake the work of the State, may it not be urged that he in a measure subjects himself to the same rules of action, and that if the body which expresses the judgment of the State believes that the particular services should be rendered without profit he is not at liberty to complain? While we have said again and again that one volunteering to do such services cannot be compelled to expose his property to confiscation, that he cannot be compelled to submit its use to such rates as do not pay the expenses of the work, and therefore create a constantly increasing debt which ultimately works its appropriation, still is there not force in the suggestion that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public? Again, whenever a purely public use is contemplated, the State may and generally does bestow upon the party intending such use some of its governmental power. It creates the right of eminent domain, by which property can be taken, and taken, not at the price fixed by the owner, but at the market value. It thus enables him to exercise the powers of the State, and, exercising those powers and doing the work of the State, is it wholly unfair to rule that he must submit to the same conditions which the State may place upon its own exercise of the same powers and the doing of the same work? It is unnecessary in this case to determine this question. We simply notice the

arguments which are claimed to justify a difference in the rule as to property devoted to public uses from that in respect to property used solely for purposes of private gain and which only by virtue of the conditions of its use becomes such as the public has an interest in. In reference to this latter class of cases, which is alone the subject of the present inquiry, it must be noticed that the individual is not doing the work of the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and freedom of contract. . . . If under such circumstances he is bound by all the conditions of ordinary mercantile transactions he may justly claim some of the privileges which attach to those engaged in such transactions. And while by the decisions heretofore referred to he cannot claim immunity from all state regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile business."

The foregoing observations of Justice Brewer have been quoted because of the importance of the possible distinction suggested by him. In fact, however, this distinction has not, as yet, been accepted by the courts. Should it be accepted it would prepare the way for a legislative regulation of the rates of distinctively public services which could be much more drastic than that which the courts have thus far been willing to uphold as constitutional; for it would mean that the rates might be fixed at a point which would barely pay the actual operating costs, that is, the cost of rendering the services for which the rates are paid, leaving no surplus revenue for the payment of and return upon the properties employed. The likelihood of the courts taking such a position as this is, in the light of the numerous cases decided since *Cotting v. Kansas Stock Yards Co.*, very remote. It is further to be noted that Justice Brewer makes no attempt to state criteria for judging when a business is of a distinctively public service character, as contrasted with one which, primarily private in character, has a public interest attached to it, unless, indeed, the grant to the private corporation of the right to exercise the power of eminent domain be regarded as decisive.

§ 521. The Right of Public Service Corporations to Cease Operation.

In connection with the constitutional power of the State, under certain circumstances, to fix rates which will not yield a fair net return to the corporations concerned upon the properties employed by them, the question of the right of such corporation to cease operation becomes an important one.

If the State has granted no special privileges, corporate franchises, or other powers to the corporations or individuals concerned, it is settled

that they may, at any time they see fit, cease to supply the public services which they have been providing.¹²⁵

Even as to such public services as railways, water, gas and electric light companies, etc., which operate under State granted charters and enjoy special rights, including that of eminent domain, the denial of a right to discontinue operation when the business proves to be an unremunerative or losing one, is held to be a denial of due process of law unless there has been some express or implied contract upon the part of the companies concerned to supply the services rendered by them. There are some early cases which contain contrary *dicta*, but the modern rule is as stated.¹²⁶ Thus, in *Bullock v. Florida Ry. Com.*,¹²⁷ we find Justice Holmes declaring: "Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future."¹²⁸ No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State, and have been allowed to exercise the power of eminent domain." Again, in *Ry. Com. v. Eastern Texas R. Co.*¹²⁹ we find Justice Van Devanter saying: "The usual permissive charter of a railroad company does not give rise to any obligation on the part of the company to operate its road at a loss. No contract that it will do so can be elicited from the acceptance of the charter or from putting the road in operation. The company, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return and if at any time it develops with reasonable certainty that future operation must be at a loss, the company may discontinue operation and get what it can out of the property by dismantling the road. To compel it to go on at a loss, or to give up the salvage value, would be to take its property without the just compensation which is part of due process of law."¹³⁰

¹²⁵ It may be, however, that, under given circumstances, a reasonable prior notice of intention to cease must be given. As to this see Wyman, *Public Service Corporations*, Sec. 290.

¹²⁶ See for these early cases, Chaplin, "Limitation upon the Right of Withdrawal from Public Employment," 16 *Harvard Law Rev.* 555. For statements of the modern rule see *Fellows v. Los Angeles* (151 Cal. 52); *Village of St. Clairsville v. Public Utilities Com.* (102 Ohio, 574). These, and other cases are cited (notes 9 and 10) by Oliver P. Field in his article "The Withdrawal from Service of Public Utilities Companies" in 35 *Yale Law Journal*, 169.

¹²⁷ 254 U. S. 513.

¹²⁸ Citing *Brooks-Scanlon Co. v. Ry. Com.* (251 U. S. 396).

¹²⁹ 264 U. S. 79.

¹³⁰ In this case it was contended by the Railroad Commission that there were State statutes which forbade the withdrawal. The Supreme Court, however, refused to give to them that construction. See also, *Ft. Smith Light & Traction Co. v. Bourland* (267 U. S. 330).

However, the courts have at times declared that, as to companies operating under State granted charters, the right of withdrawal may be denied if these charters, which are contracts between the companies and the States granting them, are mandatory and not permissive only in character. If mandatory, the company may be compelled to operate during the term of the charter, even though the business is an unremunerative or losing one. The fact is, however, that there are few, if any, such mandatory charters in existence.¹³¹

The right of public service companies to discontinue parts of their services presents a question different from that of total abandonment. In such cases the rule is established that the company may be denied the right to discontinue the operation of a branch of its road or a portion of its service while continuing to enjoy its franchise or other privileges, even though the service which it desires to discontinue is a losing one. If, however, the branch or service is one which is so related to the service as a whole that loss upon that branch or partial service is such as to cause a loss on the whole system or service it would seem that the right to discontinue exists.¹³² In *Ft. Smith Light & Traction Co. v. Bourland*,¹³³ a street railway company, upon being ordered by the city to change the grade on one of its lines, sought to abandon the line upon the ground that the cost of relaying the tracks would make its operation unremunerative. The Supreme Court, upholding the validity of the municipal ordinance in question and denying the right of the company to discontinue the operation of the line affected, said: "The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss.¹³⁴ This is true even where the system as a whole fails to earn a fair return upon the value of the property. So far as appears, this company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot in the absence of contract be compelled to operate its system at a loss.¹³⁵ But the Constitution does not confer upon the company the

¹³¹ Mr. Field, in the article earlier cited says: "After reading a large number of cases and noticing that the charters which come before the courts for construction in this class of cases never seem to be mandatory, but always permissive, one wonders whether there is in existence a charter at present which expressly binds the owners of the utility to operate within the rule laid down by the courts, particularly that expressed by the United States Supreme Court."

¹³² *Iowa v. Old Colony Trust Co.* (215 Fed. 307).

¹³³ 267 U. S. 330.

¹³⁴ Citing *Missouri Pac. Ry. Co. v. Kansas* (216 U. S. 262); *Chesapeake & Ohio Ry. Co. v. Public Service Com.* (242 U. S. 603).

¹³⁵ Citing *Brooks-Scanlon Co. v. Ry. Com. of La.* (251 U. S. 396).

right to continue to enjoy the franchise and escape from the burdens incident to its use." ¹³⁶

The right of a public utility concern to discontinue its entire service does not necessarily carry with it the right to dismantle its plant or tear up its tracks, at any rate not until a fair opportunity has been given to ascertain whether there may not be other parties who will be willing to purchase the plant or lines at a fair valuation and continue the service. ¹³⁷

§ 522. Valuation of Property and Rate Regulation.

The question as to the criteria to be accepted by the courts in determining whether or not a legislatively prescribed rate is a reasonable one, or, at least, that it is not so low as to be confiscatory in character, received for the first time, an adequate discussion by the Supreme Court in *Smyth v. Ames*. ¹³⁸ decided in 1898.

In this case the counsel for the State (Nebraska) contended that, if a legislatively prescribed rate was sufficient to yield some return, however small, to the railway above its operating expenses, economically administered, it should not be deemed confiscatory, and, therefore, unconstitutional. After reviewing previous decisions the court made the following statement with regard to the manner in which the reasonableness of a rate required to be charged by a public carrier or other public service was to be determined: "We hold, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In *San Diego Land & Town Co. v. National City*, ¹³⁹ decided the next year after the Nebraska case, the court was again called upon to consider,

¹³⁶ For other instances in which the operation of partial or particular services was compelled see *Brownwell v. Old Colony Ry.* (164 Mass. 29); *Re Wheeler* (115 N. Y. Supp. 605).

¹³⁷ Cf. 32 *Yale Law Journal*, 75.

¹³⁸ 169 U. S. 466.

¹³⁹ 174 U. S. 739.

with reference to a company supplying water, the criteria of reasonableness as applied to rates established by law, and to meet the contention that it should take into consideration the cost of the plant, the cost of operating it, including interest paid on money borrowed and reasonably necessary to be used in constructing it, the annual depreciation of the plant from natural causes resulting from its use, and a fair profit to the company over and above such charges for its services in supplying the water to consumers, either by way of interest on the money expended by the company for the public use, or upon some other fair and equitable basis. As to this the court said that, undoubtedly, all these matters should be taken into consideration but that the calculation that had been suggested by appellant was defective "in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just, both to the company and to the public."

In *Minneapolis & St. Louis R. Co. v. Minnesota* ¹⁴⁰ with reference to rate regulation, the court held: (1) that the legislature might reduce, or authorize a commission to reduce, as unreasonable, a joint rate agreed upon by two or more connecting roads; and (2) that a rate legislatively fixed for a single commodity was not necessarily confiscatory because, if applied to all the commodities transported, the carrier would not be able to pay its operating expenses including interest on its bonds and dividends on its stock. As to the second point the court said: "In *Smyth v. Ames*, we expressed the opinion that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons or property wholly within its limits must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. The right to permit this to be done is expressly reserved to the Interstate Commerce Commission by Section 4 of that Act, notwithstanding the general provisions of the long and short haul clause, and has repeatedly been sanctioned by decisions

¹⁴⁰ 186 U. S. 257.

of this court. While we never have decided that the commission may compel such reductions, we do not think it beyond the power of the State commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the commission in this particular."

In the Minnesota Rate cases (*Simpson v. Shepard*),¹⁴¹ the court was again called upon to consider with care the manner in which railway properties should be appraised in order to arrive at a value for rate-making purposes. This case is elsewhere considered in connection with the relation of intrastate to interstate railway rate regulation, and is here examined only with regard to the matter of the valuing of the railway properties concerned.

That the basis of calculation should be the "fair value of the property" used for the convenience of the public was reaffirmed. The court added, however, that "the ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts. . . . Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the *Smyth* case. The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way it is able to meet losses on its interstate business."

With regard to the very complicated and perplexing questions as to the mode of valuing the lands of a railway used for roadbed, yards, approaches, terminals, etc., the court, after reviewing calculations that had been employed, said that the cost-of-production value of the right of way, so far as the estimate rested upon a supposed compulsory acquisition, could not be sustained, for that carries with it the assumption that the road would be compelled to pay for its lands more than their fair market value, which assumption, in view of the road's right of eminent domain, granted to it by the State, is not to be made. Nor would the court admit that the road would be obliged to pay a "railroad value" for the properties acquired by it, though, said the court, if a piece of property should happen to have a peculiar value or special adaptation for railway purposes, that feature would need to be considered. In general, however, the lands were

¹⁴¹ 230 U. S. 352.

to be valued according to their market value for general purposes, and this value should be determined by comparing it with the value of other lands in the neighborhood, i. e., present and actual values, and not such as might hypothetically prevail if the road were not in existence. "It is manifest," said the court, "that an attempt to estimate what would be the actual cost of acquiring the right of way if the railroad were not there is to indulge in mere speculation. The railroad has long been established; to it have been linked the activities of agriculture, industry, and trade. Communities have long been dependent upon its service, and their growth and development have been conditioned upon the facilities it has provided. The uses of properties in the communities which it serves are to a large degree determined by it. The value of properties along its line largely depend upon its existence. It is an integral part of the communal life. . . . The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. . . . The evidence in these cases demonstrates that the appraisements of the St. Paul & Minneapolis properties were in substance appraisals of what was considered to be the peculiar value of the railroad right of way. . . . That question is whether, in determining the fair present value of the property of the railroad company as a basis of its charges to the public, it is entitled to a valuation of its right of way not only in excess of the amount invested in it, but also in excess of the market value of contiguous and similarly situated property. For the purpose of making rates, is its land devoted to the public use to be treated (irrespective of improvements) not only as increasing in value by reason of the activities and general prosperity of the community, but as constantly outstripping, in this increase, all neighboring lands of like character, devoted to other uses?"

Answering this last question in the negative, the court said: "Where the inquiry is as to the fair value of the property in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar properties owned by others, solely by reason of the fact that it is used in the public service. . . . Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase of value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character."

In these Minnesota Rate cases it was necessary also to consider the manner in which the expenses of operation and the revenues secured should

be apportioned as between the intrastate and interstate business of the companies concerned, and both related to the valuations of the properties involved in either intrastate or interstate transportation or both. The findings of the court as to these matters it is not necessary here to reproduce or summarize.¹⁴²

Since the Minnesota Rate cases there have not been many cases in which the Supreme Court has been called upon to consider the criteria to be adopted for the valuing of railway properties for the purpose of rate regulation. There have been, however, a number of cases, as there had been before the Minnesota cases, in which it has been necessary to make this inquiry with regard to municipal utilities, such as gas, electric light, telephone, and water companies. With regard to the regulation of these concerns there is, of course, involved, as a rule, no element of interstate transportation, and, therefore, the exercise of Federal authority, derived from the Commerce Clause, is not concerned. At the same time, it will be convenient to speak, at least briefly, of the rules of valuation adopted by the Supreme Court with reference to determining whether the rates fixed by the State or municipal authorities have, as to their amount or the manner of their establishment, satisfied the requirements of the Fourteenth Amendment with regard to due process of law and the equal protection of the laws. Especially is this examination at this place desirable in order that attention may be called to certain important respects in which the proper valuation of the plants of these municipal utilities differs from that of most railway properties, with the result that it is not proper, in all cases, to argue from what the courts have done with reference to these utilities as to what they should do with reference to railway properties. With regard to this last point, particular weight needs to be given to the circumstance that, ordinarily, a municipal utility enjoys a monopoly which, as a rule, the railroad does not. Thus, the element of "good will" does not need the same consideration. Furthermore there is not, to anything like the same extent, the need to fix various schedules of rates for different classes of commodities, or services, or localities. Under these circumstances, the courts have found it just, in the matter of valuations, to approximate much more nearly to the cost-of-reproduction theory, than they have in the case of the railroads. A review of some of the more recent cases will demonstrate this. At the same time, it is to be observed, that the courts still adhere to the doctrine that what the owners of the public utilities are entitled to receive is a fair return upon the value of their properties at the time the services are rendered.

¹⁴² For an elaborate argument in opposition to the acceptance of the doctrine of present value as declared in *Smyth v. Ames* and later cases, see the dissenting opinion by Justice Brandeis, concurred in by Justice Holmes, in *Missouri v. Public Service Commission* (262 U. S. 276).

In *San Diego Land & Town Co. v. Jasper*¹⁴³ the court, citing *San Diego Land & Town Co. v. National City*,¹⁴⁴ said: "It is no longer open to dispute that, under the Constitution, what the company [in this case a water company] is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses. . . . No doubt cost may be considered, and will have more or less importance according to circumstances. In the present case it is evident . . . that it has very little importance indeed."

In *Knoxville v. Knoxville Water Co.*,¹⁴⁵ the court again rejected the contention that, when determining the value of a plant for the purpose of ascertaining whether a legislatively prescribed rate is a reasonable one, the original cost of the plant should govern. And as to the estimated present cost of reproducing the plant, it was declared that from it a deduction should be made for depreciation of the existing plant from age and use.¹⁴⁶

In *Willecox v. Consolidated Gas Co.*,¹⁴⁷ decided at the same time as the *Knoxville Water Co.* case, the court made it perfectly plain that the value of a public service plant upon which its owners were entitled to earn a fair return, was its value at the time the rates were prescribed and were to operate. The case was, however, especially interesting because of the holding of the court with regard to certain elements that might or might not properly be included in arriving at this present value, and also, as to what was to be considered a fair return upon that value. Thus, the court declared that no allowance should be made for "good will" in the case of a concern that had such an actual monopoly as to secure it against possible competition, and that the assessed value of the franchises of the company furnished no guide for testing their value for rate-making purposes when the taxes were treated by the company as part of its operating expenses.

As to what was to be considered a fair rate of return upon the value of the property as finally determined, the court said: "There is no particular rate of compensation which must, in all cases and in all parts of the country, be regarded as sufficient for capital invested in business enterprises. Such

¹⁴³ 189 U. S. 439.

¹⁴⁴ 174 U. S. 739.

¹⁴⁵ 212 U. S. 1.

¹⁴⁶ As to cost value, see also *Stanislaus County v. San Joaquin and King's River Canal and Irrigation Co.* (192 U. S. 201), in which the court said: "The actual cost may have been too great. Mistakes of construction even though honest, may have been made; which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purposes intended. Other circumstances might exist which show the original rates much too large for fair and reasonable compensation at the present time."

¹⁴⁷ 212 U. S. 19.

compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted, and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which, in some cases, might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. . . .

"In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation which, in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York.

"Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

In effect, it would appear that, in the Consolidated Gas Co. case the court accepted the doctrine that, with reference to the determination of reasonable rates as applied to a municipal public service enjoying a substantially monopolistic status, the valuation should be based upon the cost of reproduction of the plant, less depreciation.¹⁴⁸

It is further to be noted that in this case the court held that the valuation of the franchises of the constituent gas companies, as fixed by the consolidated corporation at the time of its organization pursuant to the

¹⁴⁸ See also *Lincoln Gas & Electric Light Co. v. Lincoln* (223 U. S. 349).

State law, and used by such consolidated corporation as one of the bases for the amount of stock to be issued by it, should be accepted as conclusive by the courts where the validity of the agreement fixing the valuation had always been recognized, and the stock had earned large dividends, and had been largely dealt in for many years on the basis of the validity of such valuation.

In *Cedar Rapids Gas Light v. Cedar Rapids*,¹⁴⁹ the court somewhat varied this doctrine, without, however, substantially changing the result reached. In this case the court refused to disturb a rate which, it was estimated, would yield a return of six per cent on a valuation arrived at by determining the value of a new and modern plant with a deduction for the defects and deterioration in the existing plant.¹⁵⁰

In *Missouri v. Public Service Commission*,¹⁵¹ the court rejected as unsound a valuation of a telephone company which had been based upon the original cost of the installation of the plant, and without consideration of the fact that, since that installation, the cost of materials, labor, etc., had greatly increased, and, therefore, that the then value of the plant, due regard for depreciation having been made, was to be regarded as having correspondingly increased. The court said: "It is impossible to ascertain what will amount to a fair return upon properties devoted to public service, without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances, is essential. If the highly important element of present cost is wholly disregarded, such a forecast becomes impossible. Estimates for to-morrow cannot ignore prices of to-day."¹⁵²

In *Bluefield Waterworks and I. Co. v. Public Service Commission*,¹⁵³ the valuation fixed for rate-making purpose by the Commission was again declared defective by reason of a failure to give due weight to the fact that there had been an increase in the costs of construction. However, in *Georgia Ry. and Power Co. v. Railroad Commission of Georgia*,¹⁵⁴ decided at the same time, the court gave the warning that the valuation of the property of a public utility for rate-making purpose was not to be determined wholly by its replacement cost, less depreciation; that this estimate was to be regarded as but one of the relevant facts, and that there might, in individual cases, be reasons why the rule should not be slavishly followed.

¹⁴⁹ 223 U. S. 655.

¹⁵⁰ See the opinion of Judge Ladd in the lower court, 144 Iowa, 426.

¹⁵¹ 262 U. S. 276.

¹⁵² See also *Denver v. Denver Union Water Co.* (246 U. S. 178); *Newton v. Consolidated Gas Co.* (258 U. S. 165); and *Galveston Electric Co. v. City of Galveston* (258 U. S. 388).

¹⁵³ 262 U. S. 679.

¹⁵⁴ 262 U. S. 625.

In *Pacific Gas and Electric Co. v. City and County of San Francisco*,¹⁵⁵ the court was presented with a case in which a gas and electric light company had introduced newly patented methods by which it was able to reduce the cost of producing gas, but which also necessitated the disuse of certain parts of its plants. The court held that the value of the parts thus abandoned should not be deducted from the value of the total plant without also increasing that total value because of the increased efficiency of the plant that was continued in operation. The court said: "Installation of the inventions necessitated new outlay of money and abandonment of property theretofore valuable—both were necessary in order that the cost of manufacture might be reduced. If appellant's permissible profits depend upon the lowered costs and it is denied adequate return upon property which made the reduction possible, or recompense for the obsolescence, successful efforts to improve the service will prove extremely disadvantageous to it."¹⁵⁶

In *Northern Pacific R. Co. v. North Dakota*¹⁵⁷ it was held that a State might not fix a rate unreasonably low in order to build up a local enterprise, the court saying that, broad as is the power of the State to regulate public services, it does not justify the requirement that property devoted to one public service should also be employed for another public service, as, for example, that a company offering to carry passengers should also be compelled to carry freight. The court said: "The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty, and the requirement went beyond the reasonable exercise of the State's protective power."

In this case the State had attempted to fix unreasonable rates for the intrastate transportation of coal in carload lots, and had sought to justify its action upon the ground that public policy required the development of a local industry which would confer a benefit upon the whole people of the State. As to this the Supreme Court said that while it was true that

¹⁵⁵ 265 U. S. 403.¹⁵⁶ Justice Brandeis dissented.¹⁵⁷ 236 U. S. 585.

a State was not constitutionally bound to fix uniform rates for the transportation of all commodities, or to secure the same percentage of profit on every sort of business, it might not segregate a commodity, or a class of traffic, and compel its transportation or operation at an unreasonably low rate, even though the carrier remained able to obtain a fair return upon all of its business taken in the aggregate.

In *Norfolk & Western R. Co. v. Conley*¹⁵⁸ decided at the same time as the foregoing case, the court held that a passenger rate fixed by a State at an unreasonably low rate could not be justified upon the ground that the carrier might be able to recoup itself by its return from its freight traffic. "Thus it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."¹⁵⁹

However, in *New York v. McCall*,¹⁶⁰ it was held that a gas company might be compelled to extend its main in order to supply a portion of the territory which lay within its franchise, even though, for a time at least, the extension would not yield a fair return upon its cost. The court pointed out that there was every prospect that the extension would soon become remunerative; that the loss to the company, in any event, would be small; that there was no claim that the business of the company as a whole would be rendered unprofitable; and that, generally speaking, "corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitably for them to serve, and restricting their development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render."

In *Board of Public Utilities Commissioners v. New York Telephone Co.*,¹⁶¹ it was held that a public utility company which, by excessive depreciation charges, had created a reserve depreciation account larger than necessary adequately to maintain its property, could not be compelled to draw upon this account in order to overcome deficits in future earnings due to rates fixed by law which could not otherwise be sustained.

In *Galveston Electric Co. v. Galveston*¹⁶² it was held that a public utility company might not bring forward the fact of past losses or deficits as a reason for holding confiscatory, for the future, rates which, on the basis of present reproduction value, would otherwise be reasonably remuneratory. Reciprocally, past profits do not furnish a justification for confiscatory rates in the present or future.¹⁶³

¹⁵⁸ 236 U. S. 605.

¹⁵⁹ See also *Vandalia R. Co. v. Schnull* (225 U. S. 113).

¹⁶⁰ 245 U. S. 345.

¹⁶¹ 271 U. S. 23.

¹⁶² 258 U. S. 388.

¹⁶³ *Newton v. Consolidated Gas Co.* (258 U. S. 165).

§ 523. Summary.

In the foregoing paragraphs the author has sought to state only the more general rules or principles established by the courts with regard to the constitutional requirements in the matter of valuing railway or other public utility properties for purposes of rate regulation. For further details one must consult special treatises. It may, however, be observed that the rules or principles governing the valuation of public utility properties for purposes of rate regulation are not necessarily the same as those that may be applied for purposes of accounting and capitalization, for public purchase, or for taxation.¹⁶⁴

§ 524. Transportation Act of 1920.

On April 6, 1917, the United States declared war against Germany. From then until January 1, 1918, the railways of the country remained under private management but, in their operation, were subjected to increased Federal control in order that war-needs might be met, and especially that traffic congestion and car shortage might, so far as possible, be lessened or prevented. The leading railway executives met at Washington and organized a Railroads' War Board in order that they might keep in constant touch with the Council of National Defence, the Interstate Commerce Commission, and other agencies of the Government. By act of Congress of May 29, 1917,¹⁶⁵ the Commerce Commission was given summary power over "the movement distribution, exchange, interchange, and return of cars used in the transportation of property"; to "suspend the operation of any rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission"; and to issue such orders "as in its opinion will best promote car service in the interests of the public and the commerce of the people."

The constitutionality of these and other measures adopted at this time was not seriously doubted as, of course, the Federal commercial powers were then supplemented by the "war powers" of the Government.

However, despite all the efforts made, it was found that the demands of the situation could not be met without the greater unification of railway management and operation than was possible under private control.¹⁶⁶

¹⁶⁴ Professor T. S. Adams, in his article "Valuation of Railway Property for Purposes of Taxation" in 23 *Journal of Political Economy*, 1, says:

"The aim or goal of valuation for purposes of taxation is, in most States, comparatively clear. The object is to find the price at which the property, as a going concern or business, would sell under normal conditions. What the property cost has in this connection no necessary significance. This fact distinguishes tax valuation from valuation for purposes of rate regulation."

¹⁶⁵ 40 Stat. at L. 101. See also act of August 10, 1917, 40 Stat. at L. 272.

¹⁶⁶ See the Special Report of the Interstate Commerce Commission of December 5, 1917, reprinted in the 32d Annual Report (1918) of the Commission.

Therefore, on December 26, 1917, President Wilson, by virtue of his constitutional war powers and the authority delegated to him by the acts of Congress of August 29, 1916,¹⁶⁷ and December 26, 1917, issued a proclamation according to which the railways of the country were brought under the direct control and operation of the Federal Government. By the Federal Control Act of March 21, 1918¹⁶⁸ further provision was made by Congress for the effective exercise of the Federal control thus assumed.

After the Armistice, the demand for the return of the railroads to private management became insistent, and, on May 20, 1919, the President announced that this would be done at the end of the year. This announcement made it necessary that Congress should enact the legislation necessary for effecting the transfer and for the adjustment of the complicated financial questions that were involved. It was found impossible to secure this legislation by the end of the year, and, accordingly, Federal control was extended to March 1, 1920, upon which date the roads again came under private management.

The act providing the conditions under which this reestablishment of private management was to be effected, and the new forms of Federal regulation under which the roads were to be operated, were contained in the act of Congress of February 28, 1920,¹⁶⁹ sometimes spoken of as the "Esch-Cummings" Act, but which bears the title "Transportation Act, 1920."

It will not be feasible to set forth all the provisions of this important statute: it will, however, be sufficient to state its general purposes and some of its more important provisions. First of all, the act made elaborate provision for the period during which the railroads, under private management, might reestablish the normal operating conditions that had been so seriously disturbed while under governmental management. Thus, provision had to be made whereby the roads might reestablish their financial credit, and secure incomes adequate to meet the great increase in costs of operation which had taken place under public operation. It was felt, however, that some control should be exercised by law over the securities to be issued for sale to private investors, and that the matter of the rates which the roads might charge for their services should be placed, to a still greater extent than had been provided by the act of 1906, under the control of the Interstate Commerce Commission. In order that these matters of the regulation of rates and the issuance of securities might be intelligently

¹⁶⁷ 39 Stat. at L. 645. This act provided, *inter alia*, that "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

¹⁶⁸ 40 Stat. at L. 451.

¹⁶⁹ 41 Stat. at L. 456.

performed, it was decided that the Commission should undertake a comprehensive valuation of substantially all the railway properties of the country. Furthermore the experience of Federal management had disclosed the fact that it was highly desirable that the railways should be allowed to group themselves into larger units, or, in certain cases, to pool their businesses. Still further, it had become evident that greater effort should be made to provide ways in which disputes between the railways and their employees with regard to wages and working conditions might be avoided or settled in an equitable manner and without disturbance to the carrying on of interstate commerce.

It will not be necessary to state, even in outline, the provisions of the act which were of only a temporary character, or which related to the adjustment of the complicated accounts between the roads and the Government. The more important of the permanent provisions of the act, were the following.

§ 525. Rate Regulation.

The act extended the rate-fixing powers of the Interstate Commerce Commission, and also declared new purposes for the securing of which the powers were to be exercised. Previously to this the laws had had for their purpose the prevention of abuses upon the part of the carriers by way of discriminations and unreasonable charges. All the powers of the Commission to this end were retained by the act, but, in addition, the mandate was laid upon the Commission that the rates fixed by it should be such as will "under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as near as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." This principle, as has been earlier pointed out, had been previously declared by the Commission, but it had not before received express statutory declaration.

In another part of the act it was stated that one of the purposes of a just and reasonable rate regulation was to make it possible that the people of the United States should have adequate transportation facilities. It is thus evident that, as contrasted with the act of 1887, which had had primary and almost sole regard for the protection of shippers and localities against improper practices upon the part of the railways, the act of 1920 had in view not only this end, but also the protection of the railways themselves, and the advancement of the general interests of the whole people of the United States.

With regard to rate regulation, the old prohibitions against discriminations were retained, but the authority of the Commission with regard to the long and short haul clause was restricted to the extent of providing

that though the Commission might, in special cases, upon application by the carrier, and, after investigation, authorize the carrier to charge less for longer than for shorter hauls, it, the Commission, might not "permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed." The Commission was also forbidden to authorize a departure from the long and short haul clause merely because of potential water competition, that is, a competition that was not actually operating.

Upon the affirmative side, the Commission was authorized to establish minimum as well as maximum rates, and also to prescribe through routes, and to fix joint rates, minimum as well as maximum, and to provide for the division of these rates among the carriers concerned. In so doing, the act prescribed that the Commission "shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily without regard to mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

This legislative direction to the Commission is quoted as showing the general attitude of Congress towards the railways, and as to the manner in which, in general, the Commission was expected to exercise its delegated regulatory powers.

In exercising these rate-making powers, the Commission was authorized to act upon its own initiative as well as upon complaint made to it of existing rates.

Elsewhere¹⁷⁰ are discussed the decisions of the Supreme Court which had determined the extent to which the Federal Government possesses, and is to be regarded as having impliedly exercised, the constitutional power to control intrastate transportation rates as incidental to its power to regulate interstate rates. Upon this point, the act of 1920, in effect, gave legislative expression to what the courts had determined. The pertinent paragraphs of the act bearing upon this point were as follows:

"Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and

¹⁷⁰ See Chapter LVIII.

dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provisions of this Act.

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

§ 526. Consolidation and Unity of Operation of Railroads.

Incidental to, or, at any rate, closely connected with, the matter of rate regulation were the provisions of the act which, reversing to a considerable extent the policy of the Commerce Act of 1887 and the Anti-Trust Act of 1890, gave permission to the railways, under certain circumstances, to pool their traffics, or to unite themselves into larger units or associations. With regard to their terminals, the act made it compulsory upon the part of the roads to permit their use by other companies, and also to accord all reasonable facilities for the interchange of traffic between themselves and other lines. As to these two obligations laid upon the roads, the act reads:

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several

lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of the carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have the power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

As regards the pooling of freights, the general prohibition against the practice was retained, but the following proviso inserted: "That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have the authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises."

Not only was the pooling of the interests of the railroads in certain cases thus made possible, but their actual operating union by means of lease or ownership of stock made legally possible; for the act continues (Section 407): "Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of the stock or in any other manner not involving the consolidation of such carrier into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

Furthermore, the Commission is directed, as soon as practicable, to prepare and adopt "a plan for the consolidation of the railway properties of the continental United States into a limited number of systems." As

to these systems it is provided that "competition shall be preserved as fully as possible and whenever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management can earn substantially the same rate of return upon the value of their respective properties."

Advancing still further along the line of the policy of bringing the railways of the country more nearly into a systematic whole, or, at least, into larger natural units, the act authorizes, under certain specified conditions, the actual consolidation of the properties of the railways in single corporations for "ownership, management, and operation." These specified conditions are: (a) that the consolidation shall be in harmony with, and in furtherance of, the complete plan of consolidation mentioned in the preceding paragraph, and approved as such by the Commission; (b) that "the bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated companies as determined by the Commission"; and (c) that, when the roads propose a consolidation, they shall present their plan to the Commission, which shall notify the Governor of each State in which any part of properties involved in the proposed consolidation are situated, in order that a public hearing thereupon may be had. If after such hearing, the Commission finds that the public interest will be promoted by the consolidation and that the other conditions of the act have been fulfilled, it may enter an order approving and authorizing the plan of consolidation with such modifications and under such conditions as it may deem desirable, "and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

§ 527. Express Companies.

The act provides (Section 407, par. 7), that the power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act."¹⁷¹

¹⁷¹ These four companies were the American, Adams, Wells-Fargo, and Southern. For the approval to their consolidation given by the Commission, see 59 I. C. C. 459 (1920).

§ 528. Anti-Trust Acts Declared Not Applicable.

By Section 407, paragraph 8, of the Transportation Act it is declared that carriers affected by orders made for the consolidation of the carriers, as provided for in the act, shall be relieved from the operation of the "anti-trust" laws as designated in Section 1 of the act of October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies," and "of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under or pursuant to the foregoing provisions of this Section."¹⁷²

§ 529. Rate Regulation Provisions of the Act of 1920.

The Transportation Act of 1920 contains provisions regarding the manner in which the Interstate Commerce Commission shall exercise its rate-making powers which are of a novel as well as of a highly important character. These will be considered later in connection with the general discussion of the constitutional limits of the powers of legislatures or of their agencies to fix rates for public carriers and other public utilities and services affected with a public interest.¹⁷³

§ 530. Railway Securities—Issuance of.

By Section 439 of the act of 1920, which has become Section 20a of the Interstate Commerce Act, the Commission is given extensive control over the issuing of securities by interstate railroads (except street, suburban or interurban electric railways which are not operated as parts of general steam railroad systems). The act declares that it shall be unlawful for any such carrier "to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . or to assume any obligation or liability as lessor, lessee, guarantor, indorser,

In 1912 the Commission had made a comprehensive investigation of the rates and practices of the express companies, and found many of them unreasonable and unjustifiable. The Commission thereupon required that the operating methods of the express companies should be thoroughly revised and corrected; that through routes and joint rates should be established; and that through charges be arrived at by adding together the local rates. Also the country was divided into "zones" and "blocks" and rates required to be computed in connection therewith, and a system of class rates adopted. "This system of rate-making," says Dixon (*Railways and Government*, p. 59) "which simplifies the tariffs for both the companies and the public, may be set down as the most important piece of constructive rate-making that the Commission has accomplished. (24 I. C. C. 380; 28 I. C. C. 131.) It has now been adopted for intra-state traffic by practically all the States and is being generally extended to include commodity tariffs as well as class rates."

¹⁷² The Anti-Trust Acts referred to are those of July 2, 1890, August 27, 1894, February 12, 1913, and October 15, 1915.

¹⁷³ See *post*, § 531.

surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption."

The Commission is directed to make this order only if it finds that the object of the issue or assumption is a lawful one and compatible with the public interest, and is reasonably necessary and appropriate as a means for the performance by the carrier of its service as a common carrier to the public. Upon receipt of an application from a carrier for an issue of securities or assumption of liability, the Commission is directed to give notice thereof to the Governors of the States in which the carrier operates, and the railroad or public service or utilities commissions or other proper authorities of those States are to have the right to make such representations as they see fit in the premises to the Interstate Commerce Commission.

The jurisdiction of the Commission in the premises is declared to be exclusive and plenary. It is declared, however, that no guaranty or obligation as to the securities thus issued on the part of the United States is implied.

§ 531. Novel Principles of Rate Regulation Prescribed by the Transportation Act of 1920.

The enactment of the Transportation Act of 1920 marked the adoption by the Federal Government of a new railway policy. Attention has already been called to the features of the act relating to the consolidation of railways into a number of systems (Section 407); to the common use of terminals, for routing, and the interchange of traffic between railways and between railways and water carriers (Sections 402, 405, and 412); and to the permission to pool traffic or earnings (Section 407). In addition, with reference to the fixing of rates, the act adopts the proposition that in order to enable the less advantageously located railways to obtain a fair return, which the act fixes at six per cent on the value of their properties, and be able to give to their respective localities the transportation facilities needed by them, it is necessary to fix rates higher than those similarly needed by the more advantageously situated roads. Uniform rates are, however, desirable. Therefore, it is declared that if, in any year, a railway receives a net operating income in excess of six per centum of the value of its property, it shall place one-half of that excess in "Reserve Fund," kept by itself and pay the other half to the Interstate Commerce Commission to be used by it as a "Revolving Fund." If its net operating income does not equal

six per centum of the value of its property, a carrier may draw to the amount of such deficiency from its Reserve Fund to enable it to pay dividends or interest on its stocks, bonds, or other securities, or rent for leased roads, and for no other purposes. However, no carrier is to be required to accumulate a Reserve Fund in excess of a sum equal to five per centum of the value of its railway property, and when this amount is reached and maintained, the carrier may use for any lawful purpose the one-half excess of the income above six per cent which it would otherwise be required to pay into its Reserve Fund.

The Revolving Fund which the Commission is to accumulate is to be used by it "in furtherance of the public interest in railway transportation either by way of making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers." The conditions under which such loans or purchases and leases are to be made are specified in the act.

§ 532. "Recapture" Clause.

The constitutionality of the provisions of the act of 1920 with regard to the taking by the Government of the excess of earnings of railways over and above a reasonable return upon their properties arising from rates fixed by the Government—the so-called "Recapture" provisions—came before the Supreme Court in *Dayton-Goose Creek R. Co. v. United States*,¹⁷⁴ decided in 1924.

With regard to these provisions of the act the court again emphasized what had been said in *Akron, C. & Y. R. Co. v. United States*¹⁷⁵ that, as distinguished from previous legislation, the act of 1920 sought not only to protect the railways and shippers against unreasonable and discriminatory rates, but to secure to the general public adequate transportation services, and, in pursuance of this end, had placed the railways of the country more fully under the guardianship and control of the Government than it had previously attempted to do. In order to protect the public, said the court, it was within the constitutional power of the Government to own and operate the roads. If it could do this under the Commerce Clause¹⁷⁶ it was within its power to exert affirmative power to the same end over the roads while in private hands. The opinion continued: "Title 4 of the Transportation Act, embracing §§ 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and con-

¹⁷⁴ 263 U. S. 45.

¹⁷⁵ 261 U. S. 184.

¹⁷⁶ See § 471.

gestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

"Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

"First. Rates which, as a body, enable all the railroads necessary to do the business of a rate territory or section to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He, with every other shipper similarly situated in the same section, is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required, in the rates he pays, to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. This conclusion makes it unnecessary to discuss the question mooted, whether shippers are deprived of constitutional rights when denied reasonable rates. . . .

"Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit. If the company owned the only railroad engaged in transportation in a given section, and was doing all the business, this would be clear. If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return? Classification of railways in the matter of adjustment of rates has been sustained in numerous cases. . . .

"We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation;

that the income it receives for the use of its property is as much protected by the 5th Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property, and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the government a taking without due process.

"It is then objected that the government has no right to retain one half of the excess, since, if it does not belong to the carrier, it belongs to the shippers, and should be returned to them. If it were valid, it is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper, as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier, due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the shippers by bringing the weaker roads nearer in point of economy and efficiency to the stronger roads, and thus making it just and possible to reduce the uniform rates." ¹⁷⁷

¹⁷⁷ It is of interest, in connection with the recapture provisions of the 1920 Act to note the following expression of opinion of Commissioner Lane of the Interstate Commerce Commission in its report rendered February 22, 1911, in the *Western Advance Rates* case. He said:

"There is much persuasiveness in the argument that a surplus shall be permitted to accumulate which shall be in a sense a public fund out of which the carrier may create facilities which will produce more efficient and satisfactory service without adding to the liability of the road and without creating an additional value in the road which may call for a greater return in rates. This suggestion has much that is fundamental in it. It looks toward an adjustment between the public and the carriers that will be fair and profitable to both. It is an expression of an appreciation by a public service corporation of the philosophy upon which public regulation of carriers is based. Moreover, some method must be found under which a carrier by its own efficiency of management shall profit. A premium must be put upon efficiency in the operation of the American railroad. Rates can not be increased with each new demand of labor, or because of wasteful, corrupt, or indifferent management. Nor should rates be reduced with each succeeding improvement in method. Society should not take from the wisely managed railroad the benefits which flow from the foresight, skill, and planned coöperation of its working force. We may ruin our railroads by permitting them to impose

§ 533. Joint Rates.

As another means of securing the legitimate needs of all the roads, weaker and stronger alike, and, at the same time, protecting the interests of the public, the act provides, as has been earlier referred to, that the Interstate Commerce Commission may establish joint rates and provide the manner in which the receipts from them shall be divided between the carriers concerned.

In *Akron C. & Y. Ry. Co. v. United States*¹⁷³ the constitutionality of this provision regarding the establishing of joint rates, and the apportioning of their proceeds came before the Supreme Court, in which case it was contended that the order of the Commission fixing the rate had had for its purpose not a reasonable and equitable division of receipts between the connecting carriers, but, as a matter of public interest, the relieving of the financial needs of New England lines in order that they might be kept in

each new burden of obligation upon the shipper. And we can make no less sure of their economic destruction by taking from them what is theirs by right of efficiency of operation—the elimination of false motion, of unneeded effort, and the conservation of labor and materials. The standard of rates must be so high that the needed carrier which serves its public with honesty and reasonable effort may live. And yet rates should be still so much below the *possible* maximum as to give high and exceptional reward to the especially capable management, the well-coordinated force and plant. This is the ideal, unrealizable perhaps, but it points the way.

"In some parts of our own country as well as abroad machinery has been devised by which the return to capital invested in a public utility is increased automatically with a decrease in rates. We know of no instance in which this has been applied to a railroad, but it has been successfully applied with respect to so simple a matter as a corporation supplying artificial gas. No doubt it could be applied to a street railway. But whether it is applicable to the intensely intricate business of a commercial railroad is a matter of serious doubt.

"It would appear that one of the problems of the future in railroad regulation is to discover the machinery by which the railroad may justly take to itself an adequate return for the investment which its stockholders have made and share with the community the advantages of the surplus which it creates. This can not be done, however, by the mere assertion of this Commission that it will adopt a certain policy toward the carriers; that, for instance, we would regard with favor a certain return upon investment and an additional return out of rates to go into surplus which would remain uncanceled. We are without control over capitalization. It is not within our function to place limitations upon the purposes for which stocks or bonds may be issued, nor to designate what property they shall represent. Furthermore, the establishment of such policy necessarily implies a control over the use of the operating revenues of the carriers which would be a more radical extension of governmental control than any heretofore suggested. Manifestly considerations of this character are addressed to a body having legislative power. Any attempt on the part of the Commission to declare and carry out such a policy would, we take it, be subjected immediately to successful attack before the courts. Since we can not declare that accumulated surplus shall not be capitalized, the adoption of such a plan rests entirely with the carriers, and the volume of such surplus as a public trust fund depends entirely upon their own policy and good faith."

effective operation. In its opinion, upholding the order of the Commission, the court, interpreting the purpose of Congress as embodied in the pertinent provisions of the act of 1920, said: "The Transportation Act of 1920 introduced into Federal legislation a new railroad policy. . . . Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language.¹⁷⁹ And, to attain it, new rights, new obligations, new machinery, were created. Prominent among them were those specially designed to secure a fair return in capital devoted to the transportation service. Upon the Commission new powers were conferred, and new duties were imposed. . . . The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines), if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: The group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery

¹⁷⁹ The following references to the act are appended at this point to the opinion: To enable the carriers "Properly to meet the transportation needs of the public" (Sec. 422); to give due consideration to "the transportation needs of the country and the necessity . . . of enlarging (transportation) facilities" (Sec. 422); to "best meet the emergency and serve the public interest" (Sec. 402); to "best promote the service in the interest of the public and the commerce of the people" (Sec. 402); "that the public interest will be promoted" (Sec. 407).

for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

"Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the other hand the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue."

"It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom."

§ 534. Power of the Interstate Commerce Commission to Fix Minimum Rates.

By the Transportation Act of 1920 the Commission is given the power to fix minimum as well as maximum rates. This is in pursuance of the policy of Congress, as embodied in the act, to seek the establishment and maintenance of adequate transportation facilities for the country as well as to protect shippers and localities against oppressive or discriminatory action upon the part of the carriers. But nowhere in the act are there prescribed rules or principles in accordance with which the Commission is to exercise its power with regard to fixing of minimum rates.¹⁸⁰

¹⁸⁰ Before 1920 Congress has placed certain limitations upon the carriers as to minimum rates, especially with regard to the suppression of competition by water transporta-

§ 535. Valuation of Railroads by the Interstate Commerce Commission.

It has abundantly appeared that, in order that a proper determination may be reached as to the just and reasonable rates that carriers may charge, it is necessary to consider, chiefly, even if not solely, the value of the properties used by the carriers. Early in the history of Federal regulation the railways had been required to render accounts of their operations, but it was found impossible, from the data thus obtained, to fix the value of the properties concerned. As the Interstate Commerce Commission said in its Annual Report for 1908: "No court or commission or accountant or financial writer would for a moment consider that the present balance-sheet statement purporting to give the 'cost of property' suggests, even in a remote degree, a reliable measure either of money invested or of present value. Thus, at the first touch of critical analysis, the balance sheets published by American railways are found to be inadequate. They are incapable of rendering the service which may rightly be demanded of them. One cure seems possible for such a situation, and one only, and that is for the Government to make an authoritative valuation of railway property, and to provide that the amounts so determined shall be entered upon the books of the carriers as the accepted measure of capital assets."

By act of March 1, 1913,¹⁸¹ Congress heeded this advice and directed the Commission to make a valuation of the property of all the carriers subject to the Federal Interstate Commerce Acts. This act¹⁸² provided that the Commission should ascertain and report in detail "the value of all the property owned or used by every common carrier subject to the provisions of this Act." To enable it to do this the Commission was given the power to appoint examiners, examine witnesses, administer oaths, etc.

The tremendous extent of the work thus imposed upon the Commission will be evidenced by the following summary of the information which it was directed to obtain:¹⁸³

1. The original cost to date, the cost of reproduction new, the cost of

tion, and with reference to long and short hauls. For an excellent discussion as to the standards by which it is to be expected the Commission will exercise its authority to prescribe minimum rates, if it finds it necessary to exercise the power at all, see the article by Professor Bickel in 36 *Harvard Law Review*, 25, entitled "The Power of the Interstate Commerce Commission to Prescribe Minimum Rates."

¹⁸¹ 37 Stat. at L. 701.

¹⁸² As amended by the acts of February 28, 1920 (41 Stat. at L. 493), and June 7, 1922 (42 Stat. at L. 624).

¹⁸³ This summary of the statutory provisions is taken from Bernhardt's *The Interstate Commerce Commission: Its History, Activities and Organization* (p. 84) published as one of its "Service Monographs" by the Institute for Government Research, 1923.

reproduction less depreciation, of each piece of property (other than land) owned or used by the carrier for its purposes as a common carrier.

2. The methods by which these several costs are obtained and reasons for differences, if any.

3. Other values and elements of value of the carriers and the methods of determination of such values and reasons for differences, if any, between original cost to date, cost of reproduction new, and cost of reproduction less depreciation.

4. Original cost of land, right-of-way, and terminals owned and used for purposes of the common carrier, both as of time of dedication to public use and as of present time.

5. Original and present cost of condemnation and damages or of purchase in excess of original cost or present value.

6. Original cost and present cost of property held for purposes other than those of a common carrier, and method of valuation.

7. History and organization of present and previous corporations operating such property.

8. Financial history.

9. Amount and value of any aid, gift, grant or donation from public or private sources, including grants of right-of-way.

10. Amount of proceeds derived from sales of grants and value of unsold portion, if any, and value of any concession or allowance made to National, State or local governments by carriers in consideration of aids, gifts, grants or donations.

11. Value of all the above by States and Territories and the District of Columbia.

It is provided that all the valuations thus determined shall have *prima facie* value as evidence in all proceedings before the Commission or in judicial proceedings to enforce the Commerce Acts.

By Section 422 of the Transportation Act of 1920 it is provided that "For the purposes of this Section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under Section 19a of this Act [this relates to the valuation made by the Commission under the direction of the law of 1913], in so far as deemed available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever, pursuant to Section 19a of this Act, the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

§ 536. Shippers by Water—Federal Regulation of.

By the Shipping Act of September 7, 1916,¹⁸⁴ as amended by the act of July 15, 1918,¹⁸⁵ and the Merchant Marine Act of June 5, 1920,¹⁸⁶ powers with respect to rates charged by water carriers on the high seas and on the Great Lakes between ports in different States have been given to the Shipping Board which, so far as they go, are similar to those exercised by the Interstate Commerce Commission with reference to railways. The Shipping Board is composed of five Commissioners, increased to seven by the Merchant Marine Act, appointed by the President by and with the advice and consent of the Senate with official terms of six years. The Board has extensive powers with regard to the building, purchasing, selling, chartering and operation of merchant vessels, and the establishment of corporations for purchasing, equipment, leasing, chartering, maintenance and operation of merchant vessels, but with these powers we are not here concerned. The present concern is with the legislative regulations with regard to practices of common carriers by water, and the enforcement of these regulations by the Board.

Section 14 of the act of 1916, as amended by the Merchant Marine Act of 1920, provides that no common carrier by water shall, with respect to transportation by water between a port of a State, Territory, District or Possession of the United States and any other such port or a port of a foreign country, directly or indirectly,—

“First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term ‘deferred rebate’ in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

“Second. Use of a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term ‘fighting ship’ in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

¹⁸⁴ 39 Stat. at L. 728. The act is entitled “An Act to Establish a United States Shipping Board for the Purpose of Encouraging, Developing, and Creating a Naval Auxiliary and Naval Reserve and a Merchant Marine to Meet the Requirements of the Commerce of the United States with its Territories and Possessions and with Foreign Countries; to Regulate Carriers by Water in the Foreign and Interstate Commerce of the United States; and for Other Purposes.”

¹⁸⁵ 40 Stat. at L. 900.

¹⁸⁶ 41 Stat. at L. 988.

"Third. Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims."

Violations of the foregoing prohibitions are made punishable by a fine of not more than \$25,000 for each offence.

Section 14a of the act ¹⁸⁷ provides that the Board upon its own initiation or upon complaint made to it, may, after due hearing of all parties in interest, determine whether any person, not a citizen of the United States and engaged in transportation of persons or property by water,—

"(1) Has violated any provision of Section 14, or

"(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect of transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in Section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

"If the Board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the Board shall certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States or any Territory, District, or Possession thereof, until the Board certifies that such violation has ceased or such combination, agreement, or understanding has been terminated."

Common carriers by water are required by the act to file with the Board true copies, or, if oral, true and complete memoranda, of all agreements entered into with one another or with other parties "fixing or regulating transportation rates or fare; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating

¹⁸⁷ This section was inserted by the Merchant Marine Act of 1920.

in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term 'agreement' in this Section includes understandings, conferences, and other arrangements."

The Board is authorized to disapprove, cancel or modify any agreements thus reported to it which it finds to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act."

Section 16 of the act of 1916 provides:

"That it shall be unlawful for any common carrier by water, or any other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular, person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, or by any other unjust or unfair device or means.

"Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or other person subject to this Act."

Section 17 of the act provides:

"That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exports of the United States as compared with their foreign competitors. Whenever the Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

"Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Section 18 provides that common carriers by water shall establish and

enforce just and reasonable regulations and practices with regard to the issuing and the substance of tickets, receipts, bills of lading, etc.; as to the marking, packing, and delivering of property; the transportation of personal, sample, and excess baggage, etc.; the filing with the Board and the publishing of tariffs, the establishing of through routes; and the Board is authorized, when it finds such rates or regulations to be unjust or unreasonable, to order them to be corrected.

Section 19 provides:

"That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless, after hearing, the Board finds that such proposed increase rests upon changed conditions other than the elimination of said competition."

Other sections of the act authorize the Board to make investigations, hold hearings, secure testimony, administer oaths, make reports, etc.

Section 33 declares:

"That this Act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the Board concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission; nor shall this Act be construed to apply to intrastate commerce."

The act of July 15, 1918,¹⁸⁸ in amendment of the act of 1916, relates to matters which do not need discussion here.

By Section 8 of the Merchant Marine Act it is provided that the Board shall, in cooperation with the Secretary of War, make various investigations for the purpose of developing water commerce, and that "if after such investigation the Board shall be of opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section the Board may submit its findings to the Interstate Commerce Commission for such action as such Commission may consider proper under the existing law."

By Section 19 of the act the Board is given authority to make rules and regulations "affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or

¹⁸⁸ 40 Stat. at L. 900.

result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country."

The Board is also, by this same section, directed to request the head of any department, board, bureau or agency of the United States Government to suspend, modify or annul rules or regulations which they have established affecting shipping in the foreign trade, other than rules and regulations relating to the Public Health Service, the Consular Service and the Steamboat Inspection Service, and provision is made that no such rules should thereafter be established until submitted to the Board for its approval and final action taken thereupon by the Board or by the President. Upon refusal to act in the foregoing manner, the head of the agency of the Government concerned, or the Board may submit the facts to the President who is authorized to establish or suspend, modify or annul such rule or regulation.

In order that there may be opportunity of further promoting the Merchant Marine of the United States, Section 28 of the act of 1920 provides:

"That no common carrier shall charge, collect, or receive, for transportation subject to the Interstate Commerce Act of persons or property, under any joint rate, fare, or charge, or under any export, import, or other proportionate rate, fare, or charge, which is based in whole or in part on the fact that the persons or property affected thereby is to be transported to, or has been transported from, any port in a possession or dependency of the United States, or in a foreign country, by a carrier by water in foreign commerce, any lower rate, fare, or charge than that charged, collected, or received by it for the transportation of persons, or of a like kind of property, for the same distance, in the same direction, and over the same route, in connection with commerce wholly within the United States, unless the vessel so transporting such persons or property is, or unless it was at the time of such transportation by water, documented under the laws of the United States. Whenever the Board is of opinion, however, that adequate shipping facilities to or from any port in a possession or dependency of the United States or a foreign country are not afforded by vessels so documented, it shall certify this fact to the Interstate Commerce Commission, and the Commission may, by order, suspend the operation of the provisions of this Section with respect to the rates, fares, and charges for the transportation by rail of persons and property transported from, or to be transported, to such ports, for such length of time and under such terms and conditions as it may prescribe in such order, or in any order supplemental thereto. Such suspension of operation of the provisions of this Section may be terminated by order of the Commission whenever the Board is of the opinion that adequate shipping facilities by such vessels to such ports are afforded and shall so certify to the Commission."

Professor Dixon in his volume *Railroads and the Government*,¹⁸⁹ calls attention to the fact that, by the acts which have been described, the Shipping Board, with reference to carriers by water, has powers similar to those possessed by the Interstate Commerce Commission over rail carriers, and that, so far as these powers relate to water commerce between United States ports, and, in some particulars, in matters of foreign commerce, they are in actual conflict with the powers given to the Commerce Commission. There are also conflicts of jurisdiction. "Jurisdictional conflicts appear in connection with granting priority or embargoes on traffic moving in foreign commerce, in connection with rates on commodities for export, and with respect to through bills of lading, port regulations, delivery of freight for shipment, and other technical matters of operating procedure. Conferences between the two authorities have thus far been without result [this was written in 1922] and Congress may have to be called upon to straighten out the tangle of its own making."

Professor Dixon continues: "Of still more serious portent, from the standpoint of the public welfare, is that we now have two agencies in existence, in the nature of rivals, each interested in developing its own type of transportation. This eagerness for traffic is more marked in the case of the Shipping Board, for the obvious reason that the United States is in the shipping business and is apparently desirous of making a record. By the Panama Canal Act, the railroad companies were obliged to divest themselves of all ownership in water lines through the canal. In trans-continental territory their ability to compete with the water lines depends directly upon the extent to which the Commission will allow them to depart from the distance principle and charge only the competitive rate to and from coast points. But, in addition to this, they must have assurance of continuity in this business sufficient to warrant making investment in the necessary facilities. But when the Commission takes up this problem, it is faced with a Shipping Board determined to make business for its ships and free to draw upon the United States Treasury to cover its deficits. As already insisted, the public should enjoy the full benefit of its investment in the Panama Canal. But is it not a shortsighted policy to use the waterway and Government shipping to break down a rail-transportation system upon which a vast territory is wholly dependent? We started on the wrong tack in the Panama Canal Act. The edict separating rail and water line ownership with the purpose of making them compete, was but one more evidence of the persistent vitality of the competitive theory, the working results of which in transportation affairs are so completely at variance with hopes and expectations. What is needed is a scientific allocation of traffic between the two agencies, both of which should be under Commission control as to rates and practices."

¹⁸⁹ P. 338.

CHAPTER XLVI

THE ANTI-TRUST ACTS

§ 537. Sherman Anti-Trust Act.

By act of July 2, 1890,¹ Congress passed a law entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." The first two sections of this measure read as follows:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2, it will be observed, broadens the prohibition of Section 1 by introducing the element of monopolization as distinguished from "restraint of trade."

Section 3 makes the prohibition of restraints of trade applicable within the Territories and District of Columbia, and to commerce between them and any State of the Union or a foreign State.

Section 4 gives jurisdiction to the Circuit Courts of the United States to prevent and restrain violations of the act, and directs the several District Attorneys of the United States to institute proceedings in equity to prevent and restrain such violations, and specifically provides that the courts may issue, in appropriate cases, restraining orders or prohibitions, pending final decrees.

Section 5 provides for the issuance of subpoenas to bring before the courts the parties proceeded against.

Section 6 provides that "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section 1 of this Act, and being in the course of

¹ 26 Stat. at L. 209.

transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law."

Section 7 provides that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee."

The last section (8) of the act declares that where the words "person" or "persons" are used in the act they are to be deemed to include corporations and associations existing under or authorized by the laws of either the United States, of a Territory, of a State, or of any foreign country.

The foregoing provisions of this important law, often spoken of as the "Sherman Act," have remained without important change, though they have been added to, especially with regard to foreign commerce and labor combinations, and with regard to the administration of the act. These supplementary and amending acts will receive notice in the discussion which is to follow.

It will be observed that, in the Sherman Act, no specific reference is made to railways. This fact, coupled with the further fact that, by the Interstate Commerce Act of three years before (1887), the railways had been forbidden to form "pools" for the maintenance of interstate freight or passenger rates, led many to hold that the Sherman Act had not been intended by Congress to apply to combinations or contracts between interstate railways. However, in *United States v. Trans-Missouri Freight Association*,² decided in 1897, it was held by the Supreme Court that the provisions of the act did apply to railways.

There was also, for a considerable time, a question whether the prohibitions of the act applied to combinations or conspiracies of laborers or trade unions. In the *Danbury Hatters' case*³ it was held that they did apply.

§ 537a. In *Re Greene*.

In *Re Greene*,⁴ a case involving the status of the Distilling and Cattle Feeding Company, which controlled 75 per cent. of distilled liquors in the United States, the court held that the mere magnitude of an interstate business did not bring it within the prohibition of the Anti-Trust Act.⁵ The court said:

² 166 U. S. 290.

³ *Loewe v. Lawler* (208 U. S. 274).

⁴ 52 Fed. Rep. 104.

⁵ "It is very certain that Congress could not, and did not, by this enactment, attempt to prescribe limits to the acquisition, either by the private citizen or state corporation.

"In this acquisition and operation of the seventy distilleries which enabled the accused . . . to manufacture and control the sale of 75% of the distillery products of the country, it does not appear nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distillery products by the enlargement and extension of business was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration."⁶

§ 538. *United States v. E. C. Knight Co.*

The first case construing and applying the act to reach the Supreme Court was the so-called Sugar Trust case styled *United States v. E. C. Knight Co.*⁷

of property which might become the subject of interstate commerce, or declare that when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offense was committed by such owner or owners. All persons, individually or incorporate organizations, carrying on business avocations and enterprises involving the purchase, sale or exchange of articles, or the production and manufacture of commodities which form the subjects of commerce will, in a popular sense, 'monopolize' both state and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business production, or manufacture, with the incidental and indirect powers thereby acquired and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production or manufacture, is not the 'monopoly' or attempt to 'monopolize,' which the statute condemns." And later: "Congress certainly has not the power or authority under the Commerce Clause, or any other provision of the Constitution to limit and restrict the right of corporations created by the States or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate the price or prices at which such property or the products thereof, shall be sold by the owner or owners, whether corporations or individuals."

⁶ "The Supreme Court of the United States has not defined what a monopoly under this section of the Anti-Trust Law is. I conceive that it is not sufficiently defined by saying that it is the combination of a large part of the plants in the country engaged in the manufacture of a particular product in one corporation. There must be something more than the mere union of capital and plant before the law is violated. There must be some use by the company of the comparatively great size of its capital and plant and extent of its output, either to coerce persons to buy of it rather than of some competitor, or to coerce those who would compete with it to give up their business. There must, in other words, be an element of duress in the conduct of its business toward the customers of the trade and its competitors before mere aggregation of plant becomes an unlawful monopoly." Speech by W. H. Taft, Aug. 19, 1907, at Columbus, Ohio.

⁷ 156 U. S. 1.

In this case it was contended by the Government that the acquisition by the American Sugar Refining Company of the stock of a number of sugar refining corporations of Pennsylvania was with the object and effect of establishing a substantial monopoly of the industry, and that, inasmuch as the product was sold throughout the country and distributed among the States, the provision of the act of 1890 with reference to the monopolization or combination or conspiracy to monopolize trade and commerce among the States was violated. The court, however, applying the doctrine of *Coe v. Errol*⁸ and *Kidd v. Pearson*,⁹ held that the act did not, and constitutionally could not, extend to combinations, conspiracies or monopolies relating to the manufacture of commodities, this being a field reserved exclusively to the States. The fact that interstate or foreign trade might be incidentally affected was declared not material.¹⁰

Chief Justice Taft, in his volume *The Anti-Trust Act and the Supreme Court*,¹¹ has this to say of the Knight case:

"The truth is . . . the case for the Government was not well prepared at the circuit. No direct evidence that the sales of sugar across State lines, and the control of the business of such sales and of prices, were the chief object of the combination was submitted to the court. Nor was this chief feature of the Government's real case sufficiently set forth in the bill of complaint. And yet these facts must have been easily capable of proof. Especially noteworthy was the failure of the bill to pray for specific action by the court to enjoin the continuance of the combination."

The doctrine thus laid down by the court has never been departed from, and is, indeed, one from which there would seem to be no logical escape, if the line which divides Federal control of interstate commerce from State regulation of local industries and manufacturing is to be maintained. In applying this doctrine, however, the court, in later cases, has shown a somewhat greater readiness to find, in the acts complained of, a direct

⁸ 116 U. S. 517.

⁹ 128 U. S. 1.

¹⁰ "The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was not more than to say that trade or commerce served manufacture to fulfil its function. . . . It does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked." "There was nothing," the court continued, "in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

¹¹ P. 59.

interference with interstate commerce, and, therefore, a ground for the application of the Federal statute.

§ 539. United States v. Trans-Missouri Freight Association.

In *United States v. Trans-Missouri Freight Association*¹² the act was held to apply to railroads, and moreover, that contracts or combinations in restraint of trade were to be deemed prohibited, whether or not those contracts were in themselves reasonable. In this case a contract between several railway companies was held illegal, and the resulting association, the purpose of which was to maintain rates, and prevent competition over a territory including a number of States, was dissolved.¹³

§ 540. United States v. Joint Traffic Association.

In *United States v. Joint Traffic Association*¹⁴ the doctrine of the *Trans-Missouri Freight Association* case was affirmed. In that case the constitutional power of Congress to prohibit all contracts in restraint of interstate trade, whether reasonable or unreasonable, was questioned, and the possible far-reaching effect of an act invalidating business contracts and partnership agreements brought to the attention of the court. As to this the court said that the formation of corporations simply for business or manufacturing purposes had never been regarded as contracts in restraint of trade, and that the same is true as to partnerships. "We are not aware," the opinion continued, "that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade, within any legal definition of that term."¹⁵

§ 541. Hopkins v. United States.

In *Hopkins v. United States*¹⁶ it was held that a live stock commission merchant whose place of business was a certain stock yard and who there bought and sold stock for others, was not engaged in interstate commerce, within the meaning of the act of 1890, although the stock was shipped to him from another State. Therefore, it was held, the rules and regulations of an association of live stock commission merchants, fixing the rates to be charged, were not agreements affecting interstate commerce.¹⁷ The court,

¹² 166 U. S. 290.

¹³ Four justices dissented.

¹⁴ 171 U. S. 505.

¹⁵ It is to be observed, however, that in the *Trans-Missouri Freight Association* case, the technical legal definition of the phrase "restraint of trade" as used in the act of 1890 had been repudiated.

¹⁶ 171 U. S. 578.

¹⁷ "The selling of an article at its destination, which has been sent from another State," the opinion declared, "while it may be regarded as an interstate sale, and one which the importer was entitled to make, yet the services of the individual employed

for the evident reassurance of those who had been disturbed by the holding in the Trans-Missouri Freight Association case as to the illegality of all contracts, whether reasonable or not, in restraint of interstate trade, went on to say: "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce, in order to come within the act. . . . Many agreements suggest themselves which relate only to facilities furnished commerce, or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business, and which at the same time we would not think of as agreements in restraint of interstate trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce, by providing for it facilities, conveniences, privileges, or services, but which do not directly relate to charges for its transportation, nor to any other form of interstate commerce. To hold all such agreements void would, in our judgment, improperly extend the act to matters which are not of an interstate commercial nature."

§ 542. *Anderson v. United States.*

In *Anderson v. United States*,¹⁸ decided the same day as the *Hopkins* case, an association of dealers in live stock, providing by its rules that its members should not transact business with non-members, nor with commission men who should deal with non-members, was held not a combination or conspiracy in restraint of interstate trade, inasmuch as it appeared that membership was open to all dealers, and no attempt was made to control prices or the number of cattle bought or in any way to prevent full competition between the members. In this case the ground taken by the court was, not so much that the combination did not relate to interstate commerce, as that there was no restraint upon commerce imposed by its rules, or an attempt to monopolize such commerce.

§ 543. *Addyston Pipe & Steel Co. v. United States.*

In a series of cases, beginning with *Addyston Pipe & Steel Co. v. United States*,¹⁹ the court has shown that combinations or agreements between manufacturers or dealers do not come within the protection of the doc-

at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce; and a combination in regard to the amount to be charged for such services is not therefore, a combination in restraint of trade or commerce. . . . Indirectly, and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by the purchaser, but they are not charges which are directly laid upon the article in the course of transportation and which are charges upon the commerce itself."

¹⁸ 171 U. S. 604.

¹⁹ 175 U. S. 211.

trine of the Knight case if it appear that the attempt is made in any way directly to control or change what would normally be the course of interstate commerce in the absence of such combinations or agreements.

In the Addyston case six companies, engaged in the manufacture and sale of iron pipe, had formed a combination whereby competition in the sale of pipe throughout the United States was practically destroyed. In the exercise of the power thus possessed, the combination had allotted to its several member companies the territory within which each should have the exclusive right to sell its products. By a unanimous opinion the court held the agreement to come within the prohibition of the act of 1890. Distinguishing this combination from that in the Knight case, the court said: "The direct purpose of the combination in the Knight case was the control of the manufacture of sugar. There was no combination or agreement in terms regarding the future disposition of the manufactured article; nothing looked to a transaction in the nature of interstate commerce." As to the Addyston combination, the court said: "The direct and immediate result of the combination was . . . necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants, by reason of this combination and agreement, could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon terms and pursuant to the provisions of such combination."

§ 544. *Montague v. Lowry.*

In *Montague v. Lowry* ²⁰ was held illegal, as a restraint of interstate commerce, an association of dealers in the State of California and manufacturers in other States, with the purpose of controlling the sale of their product in California. Here there was no allotment of territory, as in the Addyston case, and, except as to the provision of the agreement that the non-resident manufacturers should sell their product only to the members of the association in California, no interstate transactions were regulated. This provision, however, it was held, rendered the entire combination a violation of the act of 1890. "It was not a combination or monopoly among manufacturers simply but one between them and dealers in the manufactured article of commerce between the States."

§ 545. *Northern Securities Case.*

In the so-called Merger case—*Northern Securities Co. v. United States* ²¹—the act of 1890 was held applicable to a combination of stockholders in the competing interstate railway companies, the aim, or at least the effect of which was to prevent or render possible the prevention of com-

²⁰ 193 U. S. 38.

²¹ 193 U. S. 197.

petition between the two roads by transferring their stock to a single holding company, organized under the laws of a State, which holding company thereby became possessed of a controlling interest in the stock of each of the railway companies.

In this case it was strenuously urged that the combination or agreement represented by the holding company was one which, in itself, had no direct relation to interstate commerce, the company being an investment company and not itself a carrier company; and that the question thus reduced itself to whether the United States had, under its commercial power, the constitutional authority to regulate the transference and holding of the shares of stock of State corporations.

To this argument the court replied that the real question at issue was not as to the power of the United States to regulate the holding of stock of State corporations, but as to the power of State corporations to restrain or monopolize interstate commerce. It was admitted that contracts or combinations relating to the holding of stock of interstate carrier companies have not, generally speaking, a direct relation to interstate commerce, and therefore, that, as to them, the doctrine of the Knight case would apply. The Merger Company, however, was not a *bona fide* investment company, but was, in its very inception and sole design, a scheme for controlling interstate commerce. Its relation to interstate commerce was thus a direct one. The court said: "The government . . . does not contend that Congress may control the mere acquisition or the mere ownership of stock in a State corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of State corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no State corporation can stand in the way of the enforcement of the national will, legally expressed. . . . The Federal court may not have the power to forfeit the charter of the Securities Company, it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish nor increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce."

By its decree the court thereupon enjoined the company from acquiring additional stock, from voting that which it had already acquired, and from exercising any control over the roads, the stock of which it held.²²

²² Justice Brewer, while concurring in the judgment, dissented from some of the

In result, the chief significance of the Merger case was as to the authority assumed by the court to look beneath the surface of acts, and, irrespective of their formal character, to hold them subject to the provisions of the Anti-Trust Act, if, thus viewed, they disclose a plan to restrain, or a capability of restraining, interstate trade.

§ 546. Beef Trust Case.

The so-called Beef Trust case—*Swift & Co. v. United States*²³—decided in 1905, added no new principle to the law of interstate commerce. The act of 1890 was held to have been violated by a combination of independent meat dealers in an attempt to monopolize commerce in fresh meat among the States, and to restrict the competition of their respective buyers when purchasing stock for them in the stock yards. It is significant, however, that the court emphasized that the unlawfulness of the general scheme was sufficient to render unlawful the constituent acts, which in themselves, and apart from their place in the general scheme, might not have been in violation of the Anti-Trust Act. "The plan may make the parts unlawful."

§ 547. Danbury Hatters' Case.

In *Loewe v. Lawler*²⁴ the court took a very advanced ground as to what will be construed to be an interference with interstate commerce. In this case the act of 1890 was held to have been violated by a combination of members of a labor organization, in the nature of a boycott, to prevent the manufacture of hats intended for transportation beyond the State, and to prevent their vendees in other States from reselling the hats, and from further negotiating with the manufacturers for further purchases. In order to bring this combination within the terms of the Federal statute the court again emphasized that where the general purpose and effect of the plan is to restrain interstate trade, the separate acts, though in themselves acts within a State and beyond Federal cognizance, become illegal as tested by the Federal law.²⁵

language of the majority justices. In his opinion the prohibition of the act of 1890 should be restricted to contracts in unreasonable restraint of trade.

Justice White in a dissenting opinion argued that, despite the disclaimer of the majority, the court was upholding the power of the United States to regulate the acquisition and holding of the property of State corporations.

Justice Holmes in a dissenting opinion argued that the act was a criminal statute and should, therefore, receive a strict construction, and, so construed, that its prohibitions should be restricted to contracts and combinations in restraint of trade which are illegal by the common law, namely, those contracts with a stranger whereby the contractor restrains his own freedom of trading, and those combinations formed with the purpose of excluding strangers to the combination from engaging in the business.

²³ 196 U. S. 375.

²⁴ 208 U. S. 274.

²⁵ "The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other States, and that for the direct purpose of destroying such in-

A case partially supporting this Danbury Hatters' case was *In re Debs*.²⁶ In that case the Circuit Court had held a combination of workmen to boycott the cars of the Pullman Car Company, and the trains carrying them, to be a violation of the act of 1890.²⁷ In the Supreme Court the case was rested upon the broader ground that the Federal Government, in the exercise of its full power over interstate commerce and the transmission of the mails, has the authority to remove every obstruction thereto. With reference to the act of 1890, the court, however, said: "We enter into no examination of the act of July 2, 1890, upon which the circuit court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

§ 548. Other Cases.

In *Shawnee Compress Co. v. Anderson* ²⁸ it was held that while a company may, in connection with the sale of its business and good-will, covenant not to reënter the business for a time or within a territory sufficiently broad to protect the vendee, a covenant so made is in violation of the act of 1890 if it be executed in pursuance of a plan to assemble under one management or ownership a business extending over two or more States.

In *Connolly v. Union Sewer Pipe Co.*²⁹ the plaintiff in error defended a

terstate traffic defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the State, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and inter-transportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial. Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that 'every' contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us." That the defendants were not themselves engaged in interstate commerce was held to be immaterial.

²⁶ 158 U. S. '564.

²⁷ 26 Stat. at L. 209.

²⁸ 209 U. S. 423.

²⁹ 184 U. S. 540.

suit upon certain promissory notes upon the ground that the company to which they were given was at the time in combination with other companies in violation of the Anti-Trust Act. The defence was overruled by the Supreme Court on the ground that the suit was not an action on the part of the company to enforce obligations directly growing out of an illegal combination. "The purchases by the defendants [plaintiffs in error] had no necessary or direct connection with the alleged illegal combination, for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination."

In *Continental Wall Paper Co. v. Voight* ³⁰ the case was distinguished from the *Connolly* case, the court holding that a recovery upon an account for goods sold and delivered by a corporation created as a means for bringing about a combination of wall paper manufacturers in violation of the act of 1890, could not be had, where, to the knowledge of both parties, the account had a direct reference to and was in execution of the agreements constituting the illegal combination.

In this case it was admitted by the demurrer that the plaintiff was the selling agent of a combination of wall paper manufacturers and that the defendants were virtually compelled to sign a jobbers' agreement which bound them to buy from the plaintiff at fixed prices the paper needed by them, and not to sell the same at lower prices or upon better terms than these or upon which the plaintiff sold to dealers other than jobbers.³¹

In *Cincinnati, etc., Co. v. Bay* ³² the court, applying the principle *de minimis non curat lex*, held that where the restraint complained of is insignificant, even though direct, a contract will not be held void as in violation of the Anti-Trust Act.

³⁰ 212 U. S. 515.

³¹ The court quoted with approval the following language of the lower court: "The conspiring mills were situated in many States. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every State. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement, and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of 'a restraint of trade,' whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the federal act."

³² 200 U. S. 179.

§ 549. Standard Oil Case: The Rule of Reason.

In 1911 the Supreme Court decided the important case of *Standard Oil Co. v. United States*,³³ in which the Standard Oil Company of New Jersey and other corporations, together with several individual defendants, were proceeded against under the Anti-Trust Act, and a decree obtained against them in the lower court according to which it was adjudged that the combining of the stocks of the various companies in the hands of the Standard Oil Company of New Jersey constituted a combination in restraint of trade and also an attempt to monopolize the interstate trade in petroleum. By this decree the Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over some thirty-seven subsidiary companies, and these companies were enjoined from paying any dividends to the Standard Oil Company, or permitting it to exercise any control over them by virtue of its stock ownership or other powers acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any other or similar combination which would violate the decree; and, finally, these companies and individuals were enjoined from engaging in interstate commerce in petroleum so long as the illegal combination should remain in existence.

In order to show that the acts of the defendants complained of were within the meaning of the terms "monopolizing" and "restraint of trade" as employed in the act of 1890, the court found it necessary to trace the history of these terms in the English common law. Generalizing the result of this historical examination, the court said: "Undoubtedly, the words 'monopolizing' and 'restraint of trade,' as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2d section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section. And, of course, when the 2d sec-

³³ 221 U. S. 1.

tion is thus harmonized with and made, as it was intended to be, the complement of the 1st, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the 1st and 2d sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract."

In the foregoing reasoning there emerges the "standard of reason" or the "rule of reason" which has come to play an important part in the construction and application of the Anti-Trust Act. According to this criterion, not every contract or combination which operates to restrain free competition between the parties is to be deemed within the prohibition of the act, but only those contracts which aim at a monopolizing of the trade or business or which are unreasonable in the sense that they can be said to be prejudicial to the public interest, or, rather, to the public policy of Congress as embodied in the act; or, furthermore, as scarcely needs to be said, which can be viewed as directly, and not merely incidentally or indirectly, affecting interstate or foreign commerce. It thus appears that no hard and fast rule or precise criteria as to the legality of combinations or restraints of trade can be laid down. Each case must depend upon its own facts. As the court went on to say in the *Standard Oil* case, "it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated as a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this con-

clusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained,—the light of reason,—the enforcement of the statute was impossible because of its uncertainty.”

The court recognized that, in taking this position, it might seem to depart somewhat from language which had been used in the cases of *United States v. Trans-Missouri Freight Association*,³⁴ and *United States v. Joint Traffic Association*³⁵ but, as to such earlier language, said:

“It is undoubted that, in the opinion in each case, general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to, and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot, by any possible conception, be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited.”

But, in order, as the court said, that there might be no possible doubt as to what the future doctrine was to be, so far as the general language of the *Freight Association* and *Joint Traffic* cases, separated from the context, was concerned, those cases were to be deemed as “necessarily now limited and qualified.”³⁶

§ 550. The American Tobacco Company Case.

In *United States v. The American Tobacco Co.*,³⁷ decided only a few days after the *Standard Oil* case, the court stated still more emphatically the “rule of reason” as necessary to be applied in construing and applying the act of 1890. Against the tobacco company it was charged that by reason of an intermingling of ownership of the stocks of the company and

³⁴ 166 U. S. 290.

³⁵ 171 U. S. 505.

³⁶ A vigorous independent opinion in the *Standard Oil* case was filed by Justice Harlan in which he urged that the literal language of the act should be strictly pursued, and, therefore, that every contract, combination, trust or conspiracy which operates in restraint of interstate trade, should be held illegal,—that, in other words, this effect appearing, there was no propriety in applying a rule of reasonableness.

³⁷ 221 U. S. 106.

of other accessory and subsidiary corporations, the company exerted a control over the interstate commerce in various forms of tobacco which was monopolistic in character and in restraint of trade. After an extended statement of the complicated facts in the case, the court declared it to be beyond dispute that the defendant company did exert a "vast power" over "the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce, indeed, relatively over foreign commerce, and the commerce of the whole world." This fact being established, the question was whether the practices which had been pursued in bringing about this result, or those that had been pursued after this vast power had been obtained, were such as to bring the company within the operation of the Anti-Trust Law. As to this the court said: "If the antitrust law is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the antitrust law not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Co. in the accessory and subsidiary companies and the ownership of stock in any of those companies among themselves were held, as was decided in the Standard Oil Co. case, to be a violation of the act and all relations resulting from such stock ownership were therefore set aside the question would yet remain whether the principal defendant, the American Tobacco Co., and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the first and second sections of the act. Again, if it were held that the corporations, the existence whereof was due to a combination between such companies and other companies was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations, but whose power alone arose from the exercise of the right to acquire and own property, would be amenable to the prohibitions of the act. Yet, further, even if this proposition was held in the affirmative, the question would remain whether the principal defendant, the American Tobacco Co., when stripped of its stock ownership, would be in and of itself within the prohibitions of the act, although that company was organized and took being before the antitrust act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power to cause them to be in and of themselves either a restraint of trade or a

monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act."

In order to answer these questions the court again examined the essential purpose of the Anti-Trust Act in order to determine the scope of its prohibitions, and again asserted that the "rule of reason" should be applied. Referring to the Standard Oil case the court declared that it had, in that case, pointed out "that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. . . . That the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade,' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect." The soundness of this rule of construction, the court declared, it saw no reason, after further mature deliberation, to doubt. "In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the Standard Oil case, the application of which rule to the statute we now, in the most unequivocal terms, reëxpress and reaffirm."

Applying the foregoing principles to the history of the tobacco combination, the court found it replete with the doing of acts which it was the obvious purpose of the act to forbid, and demonstrative of a purpose to acquire dominion and control of the tobacco industry "not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible." "We say these conclusions are inevitable," said the court, "not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established." ³⁸

³⁸ The court went on to enumerate the considerations leading to this conclusion, which, for reasons of space, it is not practicable here to reproduce.

As to the relief to be afforded in the premises, the court said that it would have to be adequate to redress the wrongs found to exist, and this involved difficulties greater than those that had been presented in any anti-trust case previously considered by the court. The reasons for this were the following: "First, because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof would afford no adequate measure of relief, since different ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy; second, because the methods of apparent ownership by which the wrongful intent was in part carried out and the subtle devices which, as we have seen, were resorted to for the purpose of accomplishing the wrong contemplated, by way of ownership or otherwise, are of such a character that it is difficult if not impossible to formulate a remedy which could restore in their entirety the prior lawful conditions; third, because the methods devised by which the various essential elements to the successful operation of the tobacco business from any particular aspect have been so separated under various subordinate combinations, yet so unified by way of the control worked out by the scheme here condemned, are so involved that any specific form of relief which we might now order in substance and effect might operate really to injure the public and, it may be, to perpetuate the wrong. Doubtless it was the presence of these difficulties which caused the United States, in its prayer for relief, to tentatively suggest rather than to specifically demand definite and precise remedies; we might at once resort to one or the other of two general remedies—(a) the allowance of a permanent injunction restraining the combination as a universality and all the individuals and corporations which form a part of or coöperate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured, a measure of relief which would accord in substantial effect with that awarded below to the extent that the court found illegal combinations to exist; or (b) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications for the purpose of preventing a continued violation of the law, and thus working out by a sale of the property of the combination or otherwise a condition of things which would not be repugnant to the prohibitions of the act.

"But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. We so consider as to the first because in view of the extent of the combination, the vast field which it covers, the all-embracing character of its activities concerning tobacco and its products, to at once stay the movement in interstate commerce of the products which the combination or its coöperating forces produce or control might

inflict infinite injury upon the public by leading to a stoppage of supply and a great enhancement of prices. The second because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows:

"First. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the antitrust act.

"Second. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of re-creating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law.

"Third. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed 60 days.

"Fourth. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirements of the statute.

"Pending the bringing about of the result just stated, each and all of the defendants, individuals as well as corporations, should be restrained from doing any act which might further extend or enlarge the power of the combination, by any means or device whatsoever. In view of the considerations we have stated, we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property." ³⁹

³⁹ Justice Harlan, in a separate opinion, again protested against the use of the "rule of reason" to modify the generality of the prohibitions of the act of 1890.

§ 551. Other Cases.

Space will not permit a *seriatim* discussion of the many cases following the Standard Oil and Tobacco cases in which the Anti-Trust Act has been construed and applied by the Supreme Court. Only the more important of them, as defining more definitely the doctrines already declared, or as developing or pointing out new implications or applications of those doctrines will be examined. The cases involving patent and similar rights are elsewhere separately treated,⁴⁰ as are also those arising out of the Clayton Act of October 15, 1914,⁴¹ and those relating to labor combinations.⁴²

In *United States v. Terminal R. Association*,⁴³ it was held that the mere combining of several independent railway terminal systems, divorced from other attendant circumstances, would not constitute a violation of the Anti-Trust Act, but that when, as in the instant case, the effect was to exclude other railways from reasonable means of entering a city, there was a combination to restrain and monopolize commerce, which, if the commerce were interstate in character, would cause the act to operate. The court remanded the case to the lower Federal court with instruction that a decree should be there entered directing the parties to submit to the court a plan for the reorganization of the contract between the fourteen defendant railway companies and the terminal company according to which any existing or future railways might be admitted to joint ownership and control of the combined terminal facilities upon such just and reasonable terms as would place them upon a plane of equality in respect of burdens and benefits with the existing proprietary companies, and, furthermore, which would provide for the use upon just and reasonable terms of the terminal facilities by such other railways as might not elect to become joint owners thereof.

In *United States v. Reading Co.*⁴⁴ it was held that the Anti-Trust Act had been violated by carriers possessing a substantial monopoly of the transportation facilities between the anthracite coal deposits in Pennsylvania and tidewater distributing points, and also controlled, with the aid of subsidiary coal-mining and selling companies, nearly seventy-five per cent of the annual products of the anthracite coal mines, when, with the intent and effect of preventing the construction of an independent railway, they obtained control of coal properties which would have supplied the traffic to the proposed independent railway line. This was so, the court said, even though the various contracts, taken singly, and divorced from the general scheme to restrain or monopolize the trade, might have been wholly legal. As to the interstate character of the scheme, the court pointed out that the prime object was not so much the control and sale of coal in Pennsylvania as the control of sales at New York harbor.

⁴⁰ See Chapter LXIII.

⁴¹ 38 Stat. at L. 730. See Chapter XLIX.

⁴² See Chapter XLIX.

⁴³ 224 U. S. 383.

⁴⁴ 226 U. S. 324.

In *United States v. Union Pacific R. Co.*⁴⁵ it was held that a combination of railroads engaged in interstate commerce which created a dominating control in one corporation, with the result that existing competition in interstate commerce was unduly restrained was a violation of the Anti-Trust Act of 1890, whether accomplished by a direct transfer of stock interests or through a holding company. The qualification that the restraint needed to be an undue one, in order to bring the combination within the prohibition of the act, is to be noted. The court ordered that a decree be entered in the lower court enjoining the voting of the stock while owned or controlled by the Union Pacific Company, and the payment of dividends while so held, except to a receiver to be appointed by the lower court; any plan for the disposal of the stock should be submitted to the lower court for its approval; and that, should no such plan be submitted, or, if submitted, not approved by the court, there should be a receivership and sale, if necessary, in order to dispose of the stock in such a way as to dissolve the unlawful combination.

In *United States v. Patten*⁴⁶ it was held that the act of 1890 was violated by a conspiracy to obtain a "corner" in the available supply of a staple commodity, such as cotton, normally a subject of interstate commerce, one of the means of securing such a "corner" being the making of purchases for future delivery coupled with a withholding of the commodity from sale for a limited time and thereby artificially enhancing its price to all buyers throughout the country. "Of course," said the court, "the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply . . . where the trade or commerce is interstate, unless the effect thereon is direct, not merely indirect." As to the conspiracy in question, the court said: "The commodity to be cornered was cotton,—a product of the Southern states, largely used and consumed in the Northern states. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern states. The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

"Bearing in mind that such was the nature, object, and scope of the

⁴⁵ 226 U. S. 61.

⁴⁶ 226 U. S. 525.

conspiracy, we regard it as altogether plain that, by its necessary operation, it would directly and materially impede, and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent."

In *United States v. Pacific & Arctic R. & Navigation Co.*⁴⁷ it was held that an agreement between railway and steamship carriers and a wharfage company to establish a through route and joint rates between interstate points, and to refuse to make similar arrangements with other connecting carriers, and to charge high local rates and discriminating wharfage dues, was a violation of the act. The case was in error to review a judgment of a lower court sustaining demurrers to an indictment charging violations of the act. The Supreme Court, reversing this ruling, said: "The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska, and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the anti-trust law,—of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal."

In *Nash v. United States*⁴⁸ the court held that the act was not, upon its criminal side, so vague as to make it inoperative. To the contention that the criminality of an act could not properly be made dependent upon whether a jury might think it reasonable or unreasonable, the court replied that the law is full of instances in which a man's fate depends upon his rightly estimating the legal character of his act, that is, rightly as subsequently determined by a jury.

In *Eastern States Retail Lumber Dealers' Association v. United States*⁴⁹ it was held that the act was violated by a concerted, systematic, and periodical circulation among their members by associations of retail lumber dealers, of confidential information giving the names of wholesale lumber dealers engaged in interstate commerce reported as selling directly to consumers, with the intent and effect of causing the retailers to withhold their patronage from such wholesale dealers. The court said:

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler

⁴⁷ 228 U. S. 87.

⁴⁸ 229 U. S. 373.

⁴⁹ 234 U. S. 600.

who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'

"When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding. It follows that its decree must be affirmed."

In *Board of Trade of Chicago v. United States*⁵⁰ it was held that the act was not violated by reasonable regulations by a Board of Trade of its members as regards their Board transactions. The court said of the regulation in question: "The restraint imposed by the rule is less severe than that sustained in *Anderson v. United States*, 171 U. S. 604. Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity."

The following statement of the court with reference to the scope of the Sherman Law is worth quotation: "The case [in the trial court] was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to

⁵⁰ 246 U. S. 231.

be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret the facts and to predict consequences."

Here was made very plain the conviction, to which the court had arrived, that it was proper that, in construing and applying the act, it should take economic actualities into consideration, and that no hard and fast formula or technical rule would be applied by it in determining the legality of acts under the statute.

In *United States v. United States Steel Corporation*⁵¹ it was held that a holding company, organized by former competitors and greater in size and productive power than any of its competitors, and, in fact, equal or nearly equal to them all taken together, was not in violation of the act when it appeared that a monopoly had not, in fact, been created which was able to fix prices and suppress direct and effective competition. In this case it appeared that the Steel Corporation, a holding company, had, early in its history, resorted to pools, associations, trade meetings, etc., in order to fix or control prices, but that these practices had been discontinued before the bringing of the suit. This being so, these former practices, the court said, were not to be considered. "Our consideration should be of, not what the corporation had power to do or did, but what it has now the power to do and is doing. . . . There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them, and certainly no 'dangerous probability' of their resumption, the test for which *Swift & Co. v. United States* (196 U. S. 396) is cited." Since 1911, the court continued, no act in violation of law had been established against the corporation, unless its mere existence could be said to be such a violation. But this supposition could not properly be made. "The corporation," said the court, "is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible."

In the Tobacco and the Standard Oil cases, as contrasted with the instant case, the opinion declared, the court had had to deal with "a persistent and systematic lawbreaker masquerading under legal forms, and which had not only to be stripped of its disguises but arrested in its illegality."⁵²

⁵¹ 251 U. S. 417.

⁵² Justices Day, Pitney and Clarke dissented. Justices McReynolds and Brandeis took no part in the consideration or decision of the case.

In *United States v. Reading Co.*⁵³ it was held that the Anti-Trust Act was violated by the creation and operation of a holding company which acquired all the stock of one of the largest coal companies in Pennsylvania and of a railroad, a thousand miles in length, over which the product of the coal company found its way to interstate markets. Also, that the granting of unusual credits in payment of freight bills by a railroad to a coal company controlled by it tended unduly to restrain interstate commerce.

In *American Column and Lumber Co. v. United States*⁵⁴ the court held that the act had been violated by a combination of manufacturers, controlling one-third of the total production of hard wood in the United States, which provided for an exchange of reports by the members thereof of stocks held, sales made, prices charged, etc., with a view to procuring harmonious action by the members with respect to volume of production, prices, etc., but without any specific agreement with respect thereto. The court said: "It is plain that the only element lacking in this scheme to make it a familiar type of the competition-suppressing organization is a definite agreement as to production and prices. But this is supplied by the disposition of men 'to follow their most intelligent competitors,' especially when powerful; by the inherent disposition to make all the money possible joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith, and of trade punishment by powerful rivals." And, later in its opinion, the court said: "Genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract as was done here, to submit their books to the discretionary audit and their stocks to the discretionary inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a 'harmonized' estimate of the market as it is, and as, in his specially and confidentially informed judgment, it promises to be."

In *United States v. American Linseed Oil Co.*⁵⁵ it was held that the Anti-Trust Act had been violated by a combination of competing manufacturers and distributors of linseed oil, cake and meal, according to which the members were required, *inter alia*, to reveal full details of their respective businesses, to publish schedules of prices, etc., and to adhere thereto, to attend monthly meetings at which concerted action was discussed, etc.

⁵³ 253 U. S. 26.

⁵⁴ 257 U. S. 377.

⁵⁵ 262 U. S. 371.

In other words, the combination was within the class of combinations declared illegal in *American Column and Lumber Co. v. United States*.⁵⁶

In *United States v. Southern Pacific R. Co.*⁵⁷ it was held that the Anti-Trust Act was violated by the acquiring by one railway company of another railway, or the substantial or vital part of another railway system, when the effect of such acquisition was to suppress or materially reduce the normal operation of competition in interstate trade. The facts of the case, the court declared, brought it within the principles settled in the *Union Pacific case*.⁵⁸ In that case the court had held that the acquisition by the *Union Pacific Railway Co.* of enough stock of the *Southern Pacific Railway Co.* to dominate and control it was forbidden by the Sherman Act. "In the instant case," the court said, "we are not dealing with the principle in the abstract. The proof is ample that the policy of the *Southern Pacific system* has been to favor transportation on its line by securing for itself, whenever practicable, the carriage of freight which would normally move eastward or westward over the shorter line of the *Central Pacific Railroad* and its connections, for its own much longer and wholly owned southern route.

In *Charles A. Ramsay Co. v. Associated Bill Posters*,⁵⁹ the court held that the Anti-Trust Act had been violated by an incorporated association which represented a combination or conspiracy of bill posters throughout the United States and Canada to monopolize the business in their respective localities and to dominate and control all trade and commerce in the posters.⁶⁰

In *United States v. New York Coffee and Sugar Exchange*⁶¹ it was held that the Anti-Trust Act was not violated by the operation of an exchange for sales of sugar for future delivery under contracts providing for actual deliveries or of a clearing association for offsetting purchases and sales, when it was not shown that an attempt had been made by the exchange or clearing association to disturb the market by raising prices.

In *Maple Flooring Mfrs. Assn. v. United States*⁶² it was held that an association engaged in gathering and distributing information to its members of costs of flooring, freight rates, statistics as to sales, prices received, and stocks on hand, and which held monthly meetings at which current prices were not discussed, and no restraint placed upon members with regard to the conduct of their several businesses, was not violating the Anti-Trust Act. The court said: "It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market

⁵⁶ 257 U. S. 377.

⁵⁷ 259 U. S. 214.

⁵⁸ 226 U. S. 61.

⁵⁹ 260 U. S. 501.

⁶⁰ See *ante*, § 446.

⁶¹ 263 U. S. 611.

⁶² 268 U. S. 563.

commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce, or, if so, it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful."

To the same effect was the ruling of the court in *Cement Mfrs. Protective Assn. v. United States*⁶³ decided the same day as the *Maple Flooring Mfrs. Assn. case*.

In *Thomsen v. Cayser*,⁶⁴ the court, further interpreting the "rule of reason," pointed out that it is to be applied not to determine whether the motives of the defendants are good or bad, or whether the power of the combination has been used oppressively or not, or, even, whether, in the court's opinion, the results of the combination have been desirable or undesirable, but only to determine whether or not there has been a restraint of trade or monopolizing, or attempt at monopolizing as distinguished from the ordinary and normal agreements that are every day entered into by merchants for the adjustment and regulation of their mutual and proper business interests. In this case was condemned a combination between ocean carriers for the purpose and with the result of establishing a uniform freight rate to certain points, which rate included a so-called "primage charge" which was to be refunded to such shippers as shipped exclusively by the members of the combination.⁶⁵

In *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*⁶⁶ it was held that the illegality of a corporation organized in violation of the act would not prevent it from recovering the purchase price of goods sold and delivered by it.

In *United States v. Trenton Potteries Co.*⁶⁷ the court declared that the doctrine was unshaken that an agreement of companies controlling over eighty per cent of the manufacturing and distributing of a product to fix and maintain prices, was in violation of the Sherman Act, irrespective of whether the prices thus fixed were reasonable or unreasonable.

§ 552. Monopolies Effected by Foreign Acts.

In *American Banana Co. v. United Fruit Co.*⁶⁸ treble damages under the Sherman Act were sued for on the ground of acts done outside of the United States which were not unlawful by the law of the place where done.

⁶³ June 1, 1925, 268 U. S. 588.

⁶⁴ 243 U. S. 66.

⁶⁵ See also *United States v. Trenton Potteries Company* (273 U. S. 392).

⁶⁶ 236 U. S. 165.

⁶⁷ 273 U. S. 392.

⁶⁸ 213 U. S. 347.

The court held the defendant not guilty under the Sherman Act, saying: "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." However, in *United States v. Sisal Sales Corp.*⁶⁹ it was held that injunction would lie at the suit of the United States against individuals or corporations which by contract, combination or conspiracy, had obtained control of the importation and sale of sisal and a complete monopoly of the internal and external trade therein, although sisal is a foreign product, and the monopoly had been effected by securing discriminating legislation in the foreign country of production. Distinguishing the instant case from the *American Banana Co.* case, the court said: "Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws."

§ 553. Webb-Pomerene Exporters' Act.

By the Webb-Pomerene Export Act of April 10, 1918,⁷⁰ it was provided that nothing contained in the Sherman Act should be construed as declaring illegal an association "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: and provided further, that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." The Webb Act also provides that the Clayton Act shall not be construed "to forbid the acquisition or ownership by any corporation of the whole or any part of the stock or other capital of any corporation organized solely for the purpose of engaging in export trade,

⁶⁹ 274 U. S. 268.

⁷⁰ 40 Stat. at L. 516. The act is entitled "An Act to Promote Export Trade and for Other Purposes."

and actually engaged solely in such export trade, unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States." The Webb Act does, however, provide that the unfair methods of competition forbidden by the Federal Trade Commission Act shall be construed "as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."

Various reports from associations organized for and engaged solely in export trade are required by the act to be filed with the Federal Trade Commission, and, furthermore, it is provided that, whenever the Commission shall have reason to believe that any such association, or any of its acts, is in restraint of the export trade of any domestic competitor, or that, either in the United States or elsewhere, it has entered into an agreement, understanding or conspiracy or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains competition therein, the Commission shall summon the officers of the association to appear, shall make an investigation, and, if it concludes that the law has been violated, shall make recommendations to the association as to the way in which it shall reorganize itself or modify its practices so as to bring it within the permissive provisions of the law. If the association fails to comply with these recommendations, the matter is to be referred to the Attorney General of the United States to take such action as he may deem proper. For the enforcement of the foregoing provisions the Federal Trade Commission is authorized to use all the powers, so far as applicable, given to it by the act establishing the Commission.

§ 554. Extraterritorial Operation.

A feature of the Webb-Pomerene Act which deserves especial attention is the fact that certain of its provisions relate to acts done outside of the territorial jurisdiction of the United States. This is true of the prohibitions of both Sections 4 and 5. It is to be noted, however, that Section 5 refers to export "Associations," whereas Section 4 makes no mention of them, and, as would appear from the debates in the House of Representatives when the act was under discussion, this omission was advisedly made. It may also be observed that Section 4 does not explicitly state whether the competitors who are to be protected are to be American or foreign traders, but the debates on the measure show that Congress had only Americans in view. Indeed, there could be no reason based on public policy why Congress should have been solicitous for the welfare of foreigners competing with Americans, even if there had not been possible constitutional objections to an attempt to provide for their welfare.

Section 4 was undoubtedly intended to meet the decision of the Supreme Court in the case of *American Banana Co. v. United Trust Co.*⁷¹ decided in 1909, in which it had been held that acts done outside the territorial jurisdiction of the United States did not come within the provisions of the Anti-Trust Act of 1890.⁷²

That the United States has the constitutional power to bring within the scope of its law acts extraterritorially committed by its own citizens, or by aliens subject, by reason or residence or otherwise, to its jurisdiction, there can be no reasonable doubt.⁷³

§ 555. Edge Act.

In connection with the Webb-Pomerene Act it is perhaps proper to refer to the Edge Act of 1919⁷⁴ which represents a further effort on the part of Congress to stimulate the foreign trade of the United States even though the act does not rest for its constitutional validity upon the Commerce Clause of the Constitution.

This act, which is in amendment of the Federal Reserve Act, authorizes the formation of banking corporations under Federal charters to do foreign banking, to finance exports, and, in general, to promote the export trade of the United States. The charter thus to be granted must be filed with and approved by the Federal Reserve Board. Within the United States the banks thus provided for may receive deposits only as incidental to their foreign transactions. Their capital stock must as a minimum be \$2,000,000, and a majority of it must be owned by American citizens. A general supervision over their operations is vested in the Federal Reserve Board.

§ 556. China Trade Act.

Also, in connection with congressional legislation for the promotion of foreign trade, may be mentioned the China Trade Act of 1922,⁷⁵ as amended by the act of February 26, 1925.⁷⁶

⁷¹ 213 U. S. 347.

⁷² The case is possibly not an authority for a statement as broad as this, because of the special circumstances attending the acts complained of, but the reasoning and language of the court made it fairly evident that, in construing the act of 1890, it would, in all cases, so hold.

⁷³ As to this see the author's *Fundamental Concepts of Public Law*.

⁷⁴ 41 Stat. at L. 378.

⁷⁵ 42 Stat. at L. 849.

⁷⁶ 44 Stat. at L. 53.

CHAPTER XLVII

UNFAIR COMPETITION: THE CLAYTON AND FEDERAL TRADE COMMISSION ACTS

It has been seen that, by the Interstate Commerce Act of 1887, amended by the Elkins Act of 1903, railway discriminations in interstate commerce, and the receiving as well as the giving of rebates were forbidden. By the Anti-Trust Act of 1890 the monopolizing or the restraining of interstate trade by means of contracts, combinations or conspiracies had also been prohibited, and, by the adoption and application by the court of the so-called "rule of reason" in determining what constitutes a restraint of trade within the meaning of the act, the Supreme Court had furnished some criteria for determining the propriety of business practices, and of the circumstances under which, or the purposes for which, concerted action between actual or potential competitors would be viewed as legally permissible, or, at least, as not embraced within the prohibitions of the Anti-Trust Act.

So long as the Federal law remained in this shape the distinction between "good trusts" whose legal right to exist might not be denied, and "bad trusts" which might be dissolved, was not a clear-cut one, nor, generally speaking, was it easy for business men of the country to determine what competitive methods they might legally employ and what would subject them to legal prosecution. Also, it is not to be denied that there was a considerable opinion throughout the country that the Supreme Court had assumed a power which Congress had not vested in it by the Sherman Act, namely, to determine according to its own economic judgment what were, and what were not, to be deemed legal combinations of labor or of capital. Still further there was a general opinion that the prohibitions contained in the Anti-Trust Act with reference to contracts, combinations or conspiracies in restraint of interstate trade, and to the monopolizing of such trade, were not broad enough to include many practices in the business world which were believed to be opposed to sound public policy and to constitute unfair competitive methods. To meet these views Congress, in 1914, enacted two important pieces of legislation:—the one, entitled the Clayton Act¹ and the other the Federal Trade Commission Act.²

¹ 38 Stat. at L. 730.

² 38 Stat. at L. 717.

§ 557. The Clayton Act.

The labor and injunctive provisions of the Clayton Act are elsewhere considered,³ and here we shall be concerned only with its other provisions, and especially with those which specify particular business or competitive practices which are to be deemed unlawful. The sections which need to be quoted are given in the footnote below.⁴

³ § 561.

⁴ SEC. 1. . . . Commerce as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States. Provided, that nothing in this act contained shall apply to the Philippine Islands.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in *bona fide* transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where

Upon the procedural side, the act provides, by Section 5, that a final judgment or decree rendered in any proceeding brought by the United States under the Anti-Trust Laws, to the effect that a defendant has vio-

the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the anti-trust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 10. That after two years from the approval of this act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among

lated those laws, is to be received as *prima facie* evidence against him in any suit brought against him by any other party under said laws as to all matters respecting which such judgments or decrees would be an estoppel as between the parties thereto.⁵

By Section 11 it is provided that the enforcement of Sections 3, 4, 7 and 8 of the act is vested in the Interstate Commerce Commission, so far as their provisions are applicable to common carriers; in the Federal Reserve Board, so far as they relate to banks, banking associations and trust companies; and in the Federal Trade Commission where applicable to all other forms of commerce. The sections further provide that whenever either one of these three bodies has reason to believe that the provisions of Sections 2, 3, 7 and 8 are being or have been violated, complaint shall be served upon the person concerned, a hearing had, and, if the commission or board finds the complaint sustained by the evidence, it shall state its findings of fact and issue and cause to be served on such person or corporation an order requiring him to cease the violations complained of. If this order is not obeyed, the commission or board may apply to the Circuit Court of Appeals of the United States within any circuit where the violation complained of was or is being committed, or where the party resides or has his place of business, for the enforcement of the order. Before the court, the finding of the commission or board, "if supported by testimony," is to be deemed conclusive, but either party may apply for leave to supply additional evidence, which application shall be granted if it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board.

The jurisdiction of the Circuit Court of Appeals to enforce, set aside,

the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

⁵ This section does not apply to consent judgments or decrees entered before testimony has been taken.

or modify the orders of the commission or board is declared to be exclusive.

Section 14 reads: "That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

§ 558. The Federal Trade Commission Act.⁶

By this act "unfair methods of competition" in interstate and foreign commerce are declared unlawful, and a Commission created for determining when unfair methods are being employed, and for issuing the necessary orders for the cessation of such employment. Furthermore as has already appeared, the enforcement of the provisions contained in Sections 2, 3, 7 and 8 of the Clayton Act is vested in the Commission so far as they do not relate to common carriers, to banks, banking associations, or trust companies. The more important portions of the Federal Trade Commission Act are given in the footnote below.⁷

⁶ 38 Stat. at L. 717.

⁷ *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of the Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good

With regard to the operative features of the Federal Trade Commission Act it is to be observed that they are exclusively administrative as distinguished from judicial in character, at least to the extent of providing that no private individual can initiate in the courts a suit under the act,

cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

and that no court is authorized to act except upon a prior complaint presented to the Commission and an order issued by that body. This is not true of the Clayton Act which, upon petition by the United States, vests original jurisdiction in the District Court to restrain violations of its pro-

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders,

visions, and which (Section 16) permits private individuals or corporations as well as the Federal Trade Commission itself to ask for injunctive relief.

Prior to the passage of the Clayton and Federal Trade Commission Acts, the terms "unfair methods of competition," or, more shortly, "unfair competition,"⁸ had had reference almost exclusively to methods involving fraud in the form of misrepresentation or in other ways. The illegality of these practices was, of course, undisputed and the power of the courts to enjoin them was well established. There was, therefore, no legislation needed to meet the evils resulting from these practices. It is clear, therefore, that Congress, by the declaration in Section V of the Federal Trade Commission Act, that "unfair methods of competition in commerce are hereby declared unlawful," and by empowering the Commission to prevent their use, had in mind something more than misrepresentative or other fraudulent practices. In other words, the attempt was to prevent acts that are economically unfair as applied to competitive business.⁹

or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Other sections of the act empower the commission and court to summon witnesses, examine accounts, penalize the giving of false evidence or the withholding of evidence, etc. Section 11 declares: "Nothing contained in this act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust acts or the acts to regulate commerce, nor shall anything contained in the act be construed to alter, modify, or repeal the said antitrust acts or the acts to regulate commerce or any part or parts thereof."

⁸ The concept of "unfair competition" is to be distinguished from that of "unfair trade" which concept the courts had developed as a branch of trade-mark law, and which refers to the attempt of a concern to have its products accepted as those of a competing concern, and thus to profit by the "good will" of that concern. Thus, as declared in *Hanover Star Milling Co. v. Metcalf* (240 U. S. 403), "the common law of trade-marks is but a part of the broader law of unfair competition."

⁹ Cf. Stevens, *Unfair Competition*, p. 5. Describing what is meant by economically fair competition, Stevens says: "In an economic sense fair competition signifies a competition of economic or productive efficiency. In other words, an organization is entitled to remain in business as long as its production and/or selling costs enable it to compete in a free and open market. As the productive and selling efficiency of one or more competing concerns in any line of business increases beyond that of others, the price of the goods sold tends correspondingly to decline. The more efficient organizations reduce the price in an endeavor to increase their volume of sales, expecting more than to compensate for the decreased profit per unit by the larger number of units sold. Generally, marginal concerns will gradually lose their market. Ultimately, if unable to reduce or hold their costs below the market price, they will be compelled to discontinue business. To the individual organization which chances thus to be eliminated the result of the process undoubtedly appears extremely harsh. Yet as long as competition continues to be regarded as an economically sound principle, as long as society accepts and countenances it, there can scarcely be said to be either unfairness or injustice involved in the results which it logically brings to pass, i. e., the elimination of inefficient organizations. The justification of the principle of competition must always be found in the benefits which its operation confers upon society."

It is to be observed that no attempt was made by the statute to define or specify the practices which are to be deemed to constitute "unfair competition." This is a task which was deliberately left to be performed by the Commission itself and by the courts, but, undoubtedly, with the expectation that the Commission, in the first instance, and the courts, on appeal, would be guided by standards which had been previously worked out in the common law or in cases interpreting the Anti-Trust Acts. But, being thus left undefined, and, therefore, not restricted to specified practices, the jurisdiction of the Commission was expected to be broad enough to reach every kind of commercial conduct that might fairly be said to be opposed to the public interest, clearly unethical, or unduly oppressive to competitors. Speaking of this provision, the report of the National Industrial Conference Board on the "Public Regulation of Competitive Practices," published in 1925, has this to say:¹⁰

"The avoidance of technical legal phraseology in the substantive provisions of these statutes showed the undoubted purpose of Congress to leave to the Federal Trade Commission and the courts the responsibility of formulating the precise limits beyond which private enterprise might not go in its quest of competitive advantage in trade. But an explicit standard was nevertheless provided for the guidance of administrative judgment. The standard set up, i. e., unfairness, was at once ethical and economic. As an ethical standard it prescribed greater honesty in dealings of producers, who commonly operate on a large scale, with consumers, who commonly take relatively small portions of the total output of even one producer. The changes in manufacture and commerce hereinbefore described had rendered antiquated the old rule of 'The Buyer Beware.' This common-law rule no longer provided an adequate safeguard against commercial chicanery and fraud. In consequence, the efficient producers of goods of genuine merit were handicapped in the marketing of their products, and it was in part the object of the enactment of Section 5 of the Federal Trade Commission Act to remove this handicap. By a blanket prohibition of 'unfair methods' it was undoubtedly intended to eliminate at least the grosser forms of artful deceit upon buyers by whomsoever practiced and howsoever achieved. The common-law protection of individual sellers whose goods were imitated was extended to all sellers whose market might be destroyed or jeopardized by that or other forms of fraudulent misrepresentation.

"But the standard of 'unfairness' was also adopted as an economic standard. Not only unfairness operating through deceit upon customers, but also unfairness operating directly by oppression of competitors, was brought within the ambit of the law. Indeed, if one may judge from the general tenor of the Senate debates, the primary consideration moving

¹⁰ P. 51.

the adoption of this section was the protection of small-scale producers in the competitive struggle. It was believed that numerous predatory competitive practices had contributed an artificial stimulus to the growth of monopolistic combinations, and it was proposed to reach these practices in whatever form they might appear. Thus, exclusive dealing arrangements and local price-cutting, though they could scarcely be termed unethical under the competitive régime, were regarded by Congress as so unquestionably uneconomic that sections specifically denouncing them, which were at one stage removed from the Clayton bill on the ground that they were fully covered by Section 5 of the Trade Commission Act, were later restored in conference. This action may be interpreted as a confession of the fear of Congress that the courts might unduly circumscribe the scope of Section 5, of the Trade Commission Act, e. g., by restricting it to the common-law doctrine of 'unfair competition.' Lest there should, in that eventuality, remain no declaration of legislative disapproval of the oppressive tactics of combinations designed to eliminate troublesome competitors, Sections 2 and 3 of the Clayton Act were made a part of the anti-trust laws. But the definition of these two special types of business practice which Congress regarded as uneconomic was clearly not intended to preclude the regulation of these or similar tactics under Section 5 of the Trade Commission Act. The debates in Congress make it plain that Sections 2 and 3 are properly to be regarded as precautionary measures. Aside from illustrating and emphasizing what was covered by Section 5 the only purpose served by their inclusion in the Clayton Act would seem to be to open to competitors injured by these practices a private remedy, as provided in the fourth section of that act."

With reference to most of the unfair competitive methods which it was undoubtedly the purpose of the Federal Trade Commission Act to prevent, it is to be said that they were those which, as experience had shown, large concerns of a monopolistic or *quasi-monopolistic* character were accustomed to employ for the purposes of either obtaining or perpetuating their monopolistic or dominating control of the market. Thus, these unfair methods of competition, though they are to be judged of, as to their legality, without regard to the matter of monopolization of the trade, are, in fact, in very many, and the most important cases, found closely connected with attempts to monopolize or otherwise restrain trade.¹¹

¹¹ In the volume entitled *Public Regulation of Competitive Practices*, published by the National Industrial Conference Board, in 1925, we find the following statement (pp. 26ff.): "It will suffice to note in this connection the character of competitive methods employed by a few of the more important combinations prosecuted under the Sherman Act. The National Cash Register Company was cited for its employment of intimidation in various guises and of espionage. The American Tobacco Company was charged with making extensive use of bogus independents and fighting brands, and also with resorting to exclusive dealer arrangements. The Standard Oil Company was cited at

The fact that so many, and, among them, the most important, of the methods of unfair competition which had come to prevail in the modern business world were thus available only to large operating concerns explains why there had not been built up in the common law legal principles condemning them, for such doctrines as existed had been developed before these large concerns, corporate or otherwise, had become prominent in business. Furthermore these common-law principles were, for the most part, available for the punishment or correction of competitive abuses rather than for their prevention. For these reasons, then, it was deemed necessary by Congress, in its effort to conserve to the public the benefit of the freest and fairest of competitive conditions, to supplement the Anti-Trust Acts by the broad declaration that all competitive methods that could be deemed "unfair" should be deemed illegal, and to create a commission with authority to issue orders, when necessary, requiring that such methods be not employed. Henceforth, then, the courts and the Interstate Commerce Commission were to attend to the matter of unjust discriminations and contracts or combinations in restraint of interstate or foreign trade, or the monopolization or attempt to monopolize such trade,

various times for its activity in securing railroad rebates and other forms of preferential treatment from carriers, as well as the frequent use of the device of local price cutting. These combinations were not by any means alone in the employment of such methods of competition. The Whiskey Trust, the American Sugar Refining Company, the Eastman Kodak Company, the Du Pont de Nemours Powder Company, the Corn Products Refining Company, and numerous others at some time during their history were charged with using one or another of the types of competitive practices which are now regarded as unfair.

"As already noted, some of these practices were particularly effective competitive weapons in the hands of the trusts. The intimidation of competitors either by threats of relentless warfare or by the institution of spurious law suits was not likely to jeopardize broad public interests save when employed by overtowering combinations with large resources against relatively small producers, though the situation might be made very disagreeable for particular enterprises even when all concerned were of small size. Interference with established business relations was a real menace only under similar circumstances. The operation of bogus independents, the use of fighting brands, and local price-cutting were not feasible except for business concerns with relatively large capital operating in a wide market. They are not adaptable to a small-scale industry. To maintain a separate manufacturing organization under concealed ownership required large capital investment. The employment of fighting brands could not long continue without the possession of other brands with good-will value from which the profits might be used to offset the temporary losses on the cut-price brand. Similarly, local price-cutting was suited only for use by a large concern with a wide market against small concerns with narrower markets. Even rebating could be used more effectively by combinations than by independents, because of the leverage which their larger volume of shipments gave them. Moreover, railway discriminations other than direct rebating were within the reach of industrial combinations, but frequently beyond that of their independent competitors. When indirect rebating came to supplant the earlier discredited practice, the trusts were often in a position, by virtue of their larger operations and the ownership of car lines, to secure and conceal very special favors."

while the Federal Trade Commission was to have the authority (supplemented of course by that of the courts) to prevent or correct all other methods which could be deemed to injure the public by depriving it of the benefits which, it was believed, accrue from the maintenance of competitive conditions which permit the operation of business concerns which are able to justify themselves by reason of the efficiency with which they are organized and administered. The legislation of 1914, then, sought to extend the protection of Federal law and of Federal regulation to the smallest as well as to the largest of the businesses engaged in interstate and foreign trade, and, with especial reference to the smaller concerns, to protect them against predatory or fraudulent practices upon the part of their larger and more powerful competitors, which would exterminate them without regard to the efficiency with which they might be organized and operated.

It will obviously not be practicable in this treatise to deal with the manner in which the Trade Commission has dealt with the hundreds of cases which have been presented to it, or which it has itself, *ex proprio motu* considered, in which the charge has been made that unfair competitive practices have been resorted to. This information must be found in the reports of the Commission. We can here deal only with the more important cases in which the courts have been called to determine whether the Commission has properly exercised its jurisdiction, whether as a matter of statutory construction or of constitutional power.¹² The cases will be considered *passim* in the chapters which follow.

¹² It may, however, be said that the report of the National Industrial Conference Board, earlier referred to, groups the orders of the Commission under the following heads and sub-heads:

THE REGULATION OF PRICE POLICIES

Price Determination in General

Less-Than-Cost Selling

Price Discrimination

(a) Local Price Discrimination

(b) Discrimination Based on Trade Status

Resale Price Maintenance

Basing-Point Price System

Guarantee Against Price Decline

THE REGULATION OF SALES PROMOTION POLICIES

Misbranding

Deceptive Advertising Concerning Quality, Condition or Value of Goods

False Claim to Endorsement

Misrepresentation of Trade Status

Misrepresentation of Origin

False Packaging

Lotteries

Misrepresentation in Sale of Securities

Commercial Bribery

Trade Name or Trade Mark Simulation

UNFAIR COMPETITION

THE REGULATION OF TRADE RELATION POLICIES

Disparagement of Competitors

Harassing Tactics

- (a) Espionage
- (b) Inducing Breach of Contract
- (c) Enticement of Employees
- (d) Threatening Litigation
- (e) Writing for Catalogues or Estimates

Bogus Independents

Exclusive Dealer Arrangements

Tying Contracts

Conspiracies in Restraint of Trade

Interlocking Directorates and Stock Acquisition in Competing Companies

CHAPTER XLVIII

MAINTENANCE OF RESALE PRICES AND TYING CONTRACTS

§ 559. Maintenance of Resale Prices.

In an important series of cases the Supreme Court has considered the question whether attempts upon the part of manufacturers to control the prices at which commodities sold by them may be resold by the retailers are in violation of the Anti-Trust Act as being in restraint of trade. These attempts have usually taken the form of giving special inducements to those retailers who agree to abide by the prices fixed by the manufacturers, or by the refusal of the manufacturers to sell to persons who do not so agree or act.

As a preliminary proposition it may be laid down that, in the absence of concerted action in the premises upon the part of producers, each of them has the right, so far as the Anti-Trust Acts are concerned, to determine, upon any or no reasonable grounds, to whom he will sell his commodities, and upon what terms. Indeed, it is probably correct to say that this right is secured to him by the due process clause of the Fifth Amendment against any possible legislation by Congress. This constitutional point was not passed upon in the case of *United States v. Colgate & Company*,¹ but in that case it was squarely determined that the Anti-Trust Acts do not deny the right.

In this Colgate case the defendant company was charged with creating and engaging in a combination with wholesale and retail dealers for the purpose and with the effect of procuring adherence upon the part of the dealers to resale prices fixed by the Colgate Company, and with thus suppressing competition between the dealers, which, it was charged, amounted to a restraint of trade in violation of the Anti-Trust Act of 1890. In its opinion the trial court pointed out that no averment had been made that there had been any contract or agreement entered into whereby the defendant or his customers had bound themselves to enhance and maintain prices further than was involved in the circumstance that the Colgate Company refused to sell to persons who would not sell at the indicated prices; and that no suggestion had been made that the defendant had attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter or sell the goods without restriction. In other words, the vendees could thus sell or give away the goods purchased upon such terms as they might see fit, subject only to the fact that by their

¹ 250 U. S. 300.

action they might incur the displeasure of the Colgate Company. The Supreme Court, after reviewing these facts, said: "The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce,—in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." ²

In the case of *Dr. Miles Medical Company v. John D. Park & Sons*,³ a different situation was presented, in that the element of agreements to monopolize were charged and sustained.⁴ The evidence showed that there had been a plan to control the entire trade in the medicines concerned, interstate as well as intrastate, by means of two forms of restrictive agreements to one or the other of which parties desiring to sell the medicines were required by the manufacturer to subscribe as a condition precedent to being supplied with the medicines. The one contract, known as "Consignment Contract—Wholesale" applied to wholesale dealers; the other, known as "Retail Agency Contract" applied to retail dealers. This system of sales, disguised as consignments to agents, the court in its opinion described as one "of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices of all sales by all dealers at wholesale or retail, whether by purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition." "That these agreements restrain trade," the court declared, "is obvious. That . . . having for their purpose the control of the entire trade they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear." ⁵

As to the definition of unlawful contracts or combinations in "restraint of trade" the court pointed out that the first consideration is the public

² Citing *U. S. v. Trans-Missouri Freight Assn.* (166 U. S. 290); *Eastern States Retail Lumber Dealers' Assn. v. United States* (234 U. S. 600).

³ 220 U. S. 373.

⁴ Attempt was made to justify these restrictive agreements upon the ground that the articles concerned were "proprietary" articles manufactured under a secret formula, but this fact, the court held, could not operate to exempt the agreements from the operation of the Anti-Trust Act.

⁵ The manner in which the court in this case disposed of the contention that, the commodities involved, being "proprietary" in character and manufactured under a secret process, contracts regarding their sale should be dealt with in a manner analogous to those dealing with articles manufactured under patent rights is elsewhere considered.

interest, and, therefore, that, to sustain a restraint as lawful, it must be found reasonable to the public as well as to the parties, and that, as to these parties, it must be limited to what, under the particular circumstances of each case, is fairly necessary to the protection of their respective interests. This, the modern doctrine, the court pointed out, was in modification of the earlier common law which had held illegal, as against public policy, all contracts in restraint of trade.

To the contention that a manufacturer has the right to control the retail sales of his own products, the court said: "Because a manufacturer is not bound to make or sell, it does not follow, in case of sale actually made, he may impose upon purchasers every sort of restriction. . . . Restraints upon alienation have been generally regarded as obnoxious to public policy. . . . Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. It has been held by this court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production." ⁶

In *United States v. Schraders' Son*,⁷ the court took pains to point out that the doctrine of the *Dr. Miles Medical Co.* case had not been overruled or in any way modified by the *Colgate* case. In the course of its opinion the court said: "It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—⁸ with all customers throughout the different States, which undertakes to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs, and thereby destroy competition and restrain the free and natural flow of trade amongst the States."

The doctrines declared in *United States v. Colgate & Co.*⁹ and *Dr. Miles Medical Company v. John D. Park & Sons*,¹⁰ have become firmly fixed by subsequent decisions, some of which are discussed in the para-

⁶ Citing *Bobbs-Merrill Co. v. Straus* (210 U. S. 339).

⁷ 252 U. S. 85.

⁸ In *Frey v. Cudahy Packing Co.* (256 U. S. 208) the court declared that an agreement in order to be in violation of the Anti-Trust Acts need not be a formal or written one, but that its existence might be deduced from a course of dealing or from other circumstances.

⁹ 250 U. S. 300.

¹⁰ 220 U. S. 373.

graphs which deal with patent, copyright and trade-mark rights in their relation to the maintenance of resale prices, and to the use, after sale or licensing, of patented or copyrighted articles.

In *Bement v. National Harrow Co.*¹¹ the Supreme Court for the first time was called upon to consider the bearing, if any, which the legal monopolies provided for by the patent and copyright laws have upon the prohibition of monopolization in the anti-trust laws. In that case it was held that these laws do not "refer to that kind of restraint of interstate commerce which may arise from reasonable and legal restraints imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

In *Standard Sanitary Mfg. Co. v. United States*,¹² commonly spoken of as the Bath Tub Trust case, the court held that the Sherman Act applied to a combination between a number of manufacturers of enamelled ware controlling eighty-five per cent of the market, according to which they had agreed not to sell their products to jobbers except at prices fixed by a committee of their number. It also appeared, in this case, that the wholesalers could not obtain these products if they did not maintain these prices. To the contention that, by these agreements, the manufacturers were doing nothing more than protect the patent rights possessed by them and employed in the manufacturing of their products, the court said that the agreements involved were similar to those which had been condemned in *Montague v. Lowry*,¹³ and that the added element of patent rights could not confer immunity from a like condemnation. The court continued: "Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights,—rights which may be pushed to evil consequences and therefore restrained."

As has already been said, in *Dr. Miles Medical Company v. John D. Park & Sons*¹⁴ the claim was made, but not sustained by the Supreme Court, that, because "proprietary" articles manufactured according to a secret formula were involved, there was a right to maintain resale prices which otherwise might not exist. In the case of *Henry v. A. B. Dick & Co.*,¹⁵ however, the court found that, with reference to articles manufactured under patent rights, there existed a right upon the part of the manufacturer to retain a considerable degree of control over the use of articles or commodities after they had been sold. In this case the Dick Company had sold patented mimeograph machines to which were attached license plates purporting to require that the machines should be used only

¹¹ 186 U. S. 70.

¹² 226 U. S. 20.

¹³ 193 U. S. 38.

¹⁴ 220 U. S. 373.

¹⁵ 224 U. S. 1.

with ink, paper, and other materials made by the Dick Company. The defendant, Henry, having sold other ink with the knowledge that it was to be used with the Dick machines, was held by the court to have infringed the mimeograph patent.

This holding was expressly overruled by the court in *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*¹⁶ Before this, however, in *Bauer v. O'Donnell*,¹⁷ the court had held that the exclusive right granted to a patentee to "make, use, and vend the invention or discovery"¹⁸ does not include the right, by notice, to limit the price at which the patented articles may be resold at retail by persons who have purchased them from jobbers who have paid the full price for them asked by the patentee or his agents. The court pointed out that in *Dr. Miles Medical Co. v. John D. Park & Sons*¹⁹ it had been held that an attempt to fix the price of an article of general use was against public policy and therefore void; and that the same had been held in *Bobbs-Merrill Co. v. Straus*²⁰ with reference to the limiting of the retail prices of copyrighted books, that is, that the practice, being opposed to public policy, was not rendered legal by reason of the copyright held by the original seller.²¹

As for the holding in the Dick case, the court, in the Bauer case, said that the restriction upon the use of the patented machines had been sustained because of the right to "use" the machines granted to the patentee in the patent statute, which distinguished it, in that respect, from the rights granted to authors by the copyright acts. But this right to "use," thus construed in the Dick case, the court held in the Bauer case, could not be held to include the right to control the prices at which patented articles which were sold should be resold by the vendees, nor did the right to "vend" the patented articles include such a right. The court said: "It is contended in argument that the notice in this case deals with the use of the invention, because the notice states that the package is licensed 'for sale and use at a price not less than \$1,' that a purchase is an acceptance of the conditions, and that all rights revert to the patentee in event of violation of the restriction. But in view of the facts certified in this case, as to what took place concerning the article in question, it is a perversion of terms to call the transaction in any sense a license to use the invention. The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to royalty thereon, or to participate in the profits thereof. . . . In other words, the title transferred was full and complete, with an attempt to reserve the

¹⁶ 243 U. S. 502.

¹⁷ 229 U. S. 1.

¹⁸ U. S. Rev. Stat., § 4884.

¹⁹ 220 U. S. 373.

²⁰ 210 U. S. 339.

²¹ See Chapter LXIII.

right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the Dick case. . . . Upon the facts as are now presented we think the right to vend secured in the patent statute is not distinguishable from the right of vending given in the copyright act."

In *Virtue v. Creamery Package Manufacturing Co.*²² it was held that the Sherman Act was not violated by a contract according to which parties manufacturing various patented dairy supplies, and controlling ninety per cent thereof, constituted another corporation their exclusive sales agent and fixed the list prices of its products. The specific facts of this case were so complicated that even a summary of them is not here practicable.

In *United States v. Winslow*,²³ however, it was held that a combination into a single company of several companies, each manufacturing a different non-competing group of patented machines collectively used for the making of shoes, was not forbidden by the Sherman Act. The new company thus formed made at its own factory all the machines which previously had been made in different places, and directly, or indirectly through subordinate companies, carried on all the commerce which had formerly been carried on by the independent or constituent companies. This commerce consisted in the licensing of the machines to shoe manufacturers on the condition that these manufacturers should use only the machines furnished by the defendants. The court said: "On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent case* (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405), and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below (195 Fed. 591) and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from 70 to 80 per cent of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the states does not appear. But taking it as true, we can see no greater objection to one corporation manufacturing 70 per cent of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same pro-

²² 227 U. S. 8.

²³ 227 U. S. 202.

portion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine, and to put the machine together, as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8."

In *Bauer & Cie v. O'Donnell*,²⁴ it was held that the patent right to "make, use, and vend" the invention or discovery did not include the right to limit by notice the price at which the patented article might be resold at retail by a purchaser from jobbers who had paid to the patentee's agent the full price asked for the article. The mere attaching to the article of a notice stating that the article was licensed for sale at a specified price could not, the court declared, convert an otherwise apparently unqualified sale into a mere "license to use" the invention.

In *Straus v. American Publishers' Association*²⁵ a similar ruling was applied to copyrights. After referring to, and quoting from, the *Bath Tub* case, the court said: "So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the Copyright Act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman Law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies."

In *Straus v. Victor Talking Machine Co.*²⁶ was involved a so-called "License Notice" attached to patented talking machines sold by the Victor Company according to which it was declared, *inter alia*, that the machine was to be used only with sound records, sound boxes, and needles manufactured by the company; that only the right to use the machines "for demonstration purposes" was granted to wholesale dealers who might assign a like right to the public or to regularly licensed Victor dealers at the dealers' regular discount royalty, and that the dealers might convey the right to use the machines only when a "royalty" of not less than \$200 was paid for each, and upon the "consideration" that all the conditions of the "license" would be observed; and that the title to the machine should remain in the Victor Company. The court, in a brief opinion, declared that this "License Notice" was plainly a device unlawfully to extend the scope of the patents involved at the expense of the general public—a device which had been in substance dealt with and held

²⁴ 229 U. S. 1.

²⁵ 231 U. S. 222.

²⁶ 243 U. S. 490.

illegal in the *Dr. Miles Medical Company* and *Bauer* cases. "Courts would be perversely blind if they failed to look through such an attempt as this 'License Notice' thus plainly is, to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that not one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose. It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a 'license to use the invention.' "

In *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*²⁷ decided the same day as the *Straus* case, the court, as has been said, expressly overruled its previous holding in *Henry v. A. B. Dick Company*.²⁸ Here, as in the *Dick* case, the manufacturer of patented machines, by a notice attached thereto, sought to restrain purchasers thereof from using them except in connection with the use of specific materials, necessary to their operation but not parts of them. After declaring that it had become settled by repeated decisions that a patentee received nothing from the law except protection in the monopoly of the manufacturing, using, and selling of the patented mechanism, the court pointed out that these rights have nothing to do with the materials, not parts of the mechanism, used in its operation. "Whatever the right of the owner may be to control by restriction the materials to be used in operating the machine, it must be a right derived through the general law from the ownership of the property in the machine, and it cannot be derived from or protected by the patent law, which allows a grant only of the right to an exclusive use of the new and useful discovery which has been made—this and nothing more." "It is obvious," said the court, "that the conclusions arrived at in this opinion are such that the decision in *Henry v. A. B. Dick Co.* must be regarded as overruled."

The foregoing cases were decided prior to the enactment of the Clayton Anti-Trust Act of 1914. By that act (Section 3) its prohibitions regarding "tying" contracts, etc., were expressly made applicable to goods, wares, machinery, supplies and other commodities "whether patented or unpatented."

²⁷ 243 U. S. 502.

²⁸ 224 U. S. 1.

In *Boston Store of Chicago v. American Graphophone Co.*,²⁹ and *United States v. United Shoe Machinery Co.*³⁰ the doctrine was reaffirmed that the monopoly given inventors by the patent laws does not fall within the Anti-Trust Act, but that this monopoly right does not enable the patentee, after parting with the title to patented articles to retain control of their sale or other incidents of title.

In *United States v. United Shoe Machinery Co.*³¹ it was held that, in an action for violation of the Sherman Act, it was no defence to show that a combination in restraint of trade left a limited field open to competition. However, it was held that the union into one corporation of a number of other corporations which had previously been engaged in the manufacture of non-competing machines used successively in a manufacturing business, was not a violation of the act. The court pointed out that the various acquisitions of properties and rights by the defendant company had not been coincident in time, or been parts of the same transaction, but had been scattered through a period of years and varied from one another and had no apparent *inter se* connection. The defendant company, the court found, was, indeed, a large one, but this was the result as well as the cause of efficiency, and its powers had not been oppressively used. However, the court in its decree enjoined the continuance of the following practices of the defendant company: "(1) the restricted use clause, which provides that the leased machinery shall not, nor shall any part thereof, be used upon shoes, etc., or portions thereof, upon which certain other operations have not been performed on other machines of the defendants; (2) the exclusive use clause, which provides that if the lessee fails to use exclusively machinery of certain kinds made by the lessor, the lessor shall have the right to cancel the right to use all such machinery so leased; (3) the supplies clause, which provides that the lessee shall purchase supplies exclusively from the lessor; (4) the patent insole clause, which provides that the lessee shall only use machinery leased on shoes which have had certain other operations performed upon them by the defendants' machines; (5) the additional machinery clause, which provides that the lessee shall take all additional machinery for certain kinds of work from the lessor or lose his right to retain the machines which he has already leased; (6) the factory output clause, which requires the payment of a royalty on shoes operated upon by machines made by competitors; (7) the discriminatory royalty clause providing lower royalty for lessees who agree not to use certain machinery on shoes lasted on machines other than those leased from the lessor."

Upon a rehearing of the case,³² these prohibitions were reaffirmed, the court saying: "While the clauses enjoined do not contain specific agree-

²⁹ 246 U. S. 8.

³⁰ 247 U. S. 32.

³¹ 247 U. S. 32.

³² *United Shoe Machinery Corp. v. United States* (258 U. S. 451).

ments not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which cover all conditions, agreements, or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants, signed by the lessee and binding upon him, effectually prevent him from acquiring the machinery of a competitor of the lessor, except at the risk of forfeiting the right to use the machines furnished by the United Company, which may be absolutely essential to the prosecution and success of his business.

"This system of 'tying' restrictions is quite as effective as express covenants could be, and practically compels the use of the machinery of the lessor, except upon risks which manufacturers will not willingly incur. It is true that the record discloses that in many instances these provisions were not enforced. In some cases they were. In frequent instances it was sufficient to call the attention of the lessee to the fact that they were contained in the lease to insure a compliance with their provisions. The power to enforce them is omnipresent, and their restraining influence constantly operates upon competitors and lessees. The fact that the lessor in many instances forbore to enforce these provisions does not make them any less agreements within the condemnation of the Clayton Act."

In *Federal Trade Commission v. Beech-Nut Packing Co.*³³ the Federal Trade Commission had condemned, as an unfair method of competition, the requirement by the Beech-Nut Company that purchasers of its products should resell such products only at standard prices, and also the company's refusal to sell to customers or dealers who would not agree so to do. The court below had held that the case was governed by the ruling in *United States v. Colgate & Co.*³⁴ and, therefore, had declared that the Federal Trade Commission had exceeded its power in making the order appealed from. The Supreme Court, however, pointed to the fact that, in the *Colgate* case, the only act charged amounted to the exercise of the right of a trader or manufacturer engaged in private business to use his own discretion as to those with whom he would deal, and that, as thus interpreted, the Sherman Act had not been violated thereby. Reference was also made to *United States v. Schrader's Son*,³⁵ and *Frey & Son v. Cudahy Packing Co.*³⁶ in which the holding in the *Colgate* case had been construed. Said the court: "By these decisions it is settled that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses

³³ 257 U. S. 441.

³⁵ 252 U. S. 85.

³⁴ 250 U. S. 300.

³⁶ 256 U. S. 208.

to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. He may not, consistently with the Act, go beyond the exercise of this right, and by contracts, combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade." In the instant case the court found that the Beech-Nut Company had gone beyond this simple refusal to sell to persons who would not resell at stated prices. "In its practical operation," said the court, "it [the system adopted by the company] necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. If he fails so to do, he is subject to be reported to the company either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it. Furthermore, he is enrolled upon a list known as 'Undesirable—Price Cutters,' to whom goods are not to be sold, and who are only to be reinstated as one whose record is 'clear' and to whom sales may be made upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices.

"From this course of conduct a court may infer—indeed, cannot escape the conclusion—that competition among retail distributors is practically suppressed for all who would deal in the company's products are constrained to sell at the suggested prices.

"Under the facts established we have no doubt of the authority and power of the Commission to order a discontinuance of practices in trading, such as are embodied in the system of the Beech-Nut Company.

"We are, however, of opinion that the order of the Commission is too broad. The order should have required the company to cease and desist from carrying into effect its so-called Beech-Nut policy by co-operative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders of purchase only to such jobbers and wholesalers as sell at the suggested prices and refusing to give such orders to dealers who sell at less than such prices, or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of dealers who sell the company's products at less than the suggested prices, or who sell to others

who sell at less than such prices in order to prevent such dealers from obtaining the products of the company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company."

In *United States v. General Electric Co.*³⁷ it was charged that the system adopted by the defendant company of disposing of the incandescent electric lights manufactured by it, under patents owned by it, amounted to an attempt upon its part to control the resale price of these lights. The court found, however, that the Westinghouse Lamp Company, and the more than twenty thousand dealers throughout the country handling these lights, were in fact agents of the General Electric, and that, therefore, the sales made by these agents were original sales and not resales. The purpose of the plan, the court held, was to enable the manufacturing company to deal directly with consumers and purchasers, and thus to prevent sale by jobbers and middlemen at different and competing prices. To the contention that the complication of the system and the large number of agents distributed throughout the country should be held to bring the system within the operation of the Anti-Trust Act, the court said: "We do not question that in a suit under the Anti-Trust Act the circumstance that the combination effected secures domination of so large a part of the business affected as to control prices is usually most important in proof of a monopoly violating the act. But under the patent law the patentee is given by statute a monopoly of making, using and selling the patented article. The extent of his monopoly in the articles sold and in the territory of the United States where sold is not limited in the grant of his patent, and the comprehensiveness of his control of the business in the sale of the patented article is not necessarily an indication of illegality of his method. As long as he makes no effort to fasten upon ownership of the articles he sells control of the prices at which his purchaser shall sell, it makes no difference how widespread his monopoly. It is only when he adopts a combination with others by which he steps out of the scope of his patent rights and seeks to control and restrain those to whom he has sold his patented articles in their subsequent disposition of what is theirs that he comes within the operation of the Anti-Trust Act."

As to the validity of the arrangement with the Westinghouse Company under which that company was given the right not only to vend but to manufacture the lights the court said the owners of the patent rights—the General Electric Company—could make and had made the Westinghouse Company its agent for both purposes. "Conveying less than title to the patent or part of it, the patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within

³⁷ 272 U. S. 476.

the reward which the patentee by the grant of the patent is entitled to secure. It is well settled, as already said, that where a patentee makes the patented article and sells it, he can exercise no future control over what the purchaser may wish to do with the article after his purchase. It has passed beyond the scope of the patentee's rights (citing cases). But the question is a different one which arises when we consider what a patentee who grants a license to one to make and vend the patented article may do in limiting the licensee in the exercise of the right to sell. The patentee may make and grant a license to another to make and use the patented articles but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. He owns the material of them and may use them. But if he sells them he infringes the right of the patentee, and may be held for damages and enjoined. If the patentee goes further and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and sell or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell."

§ 560. Federal Trade Commission Cases.

A number of cases have reached the Supreme Court on writs of certiorari from rulings of the lower courts upon orders issued by the Federal Trade Commission. These, of course, have dealt with the question of unfair trade or unfair competition as distinguished from the monopolizing or restraining of trade or of contracts or combinations so to do.

In *Federal Trade Commission v. Gratz*³⁸ it was held that there was no basis for an order by the Commission, requiring a company selling cotton ties and bagging to desist from refusing to sell ties unless the purchaser would agree to buy from it a corresponding amount of bagging as well, there being no intimation that the company had a monopoly of either ties or bagging or the ability or intention to secure one, and no averment that

³⁸ 253 U. S. 421.

the public was suffering any injury from the practice or that competition had a reasonable ground for complaint. The court pointed out that the words "unfair method of competition," not being defined by the statute, it was within the province of the court and not of the Commission ultimately to determine their exact meaning.³⁹

In *Federal Trade Commission v. Winsted Hosiery Co.*⁴⁰ the Commission was upheld as to an order by it directed against the use by a manufacturer of brands or labels describing his product as "natural merino," "gray wool," "natural wool," "natural worsted" or "Australian wool" when, in fact, his product was not composed wholly of wool. This practice, it was declared, constituted an unfair method of competition as against other concerns which truthfully marketed their goods. The fact that misrepresentation and misdescription had become so common in the trade that most dealers did not accept labels at their full face value was declared immaterial. "A method inherently unfair," said the court, "does not cease to be so because those competed against have become aware of the wrongful practice. . . . As a substantial part of the public was still misled by the use of the labels which the Winsted Company employed, the public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who marketed their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition; and it was authorized to order that the practice be discontinued."

In *Federal Trade Commission v. Curtis Publishing Co.*⁴¹ it was again affirmed that the ultimate decision as to what constitutes unfair methods of competition is vested in the courts rather than in the Commission, and that, in exercising this authority, the courts had the power to examine the whole record and evidence in the case. If, it was declared, the court finds substantial evidence from which a conclusion different from that of the Commission may be drawn, it may remand the matter to the Commission for a modification of its findings, but if, from all the circumstances, it is felt that, in the interests of justice, the controversy should be settled without further delay, the court may so do. In this case it was held that a contract by which a publisher agreed, *inter alia*, to consign to an agent a certain number of copies of its publication, and the agent agreed to supply boys and dealers with the copies so received at specified rates and to use reasonable efforts to promote sales, and that, without the consent of the publisher he would not sell in the territory of other agents, or act as agent

³⁹ Justices Brandeis and Clarke dissented on the ground that, in their opinion, Congress had intended that the determination by the Commission of what is to be deemed unfair methods of competition should be final if supported by evidence.

⁴⁰ 258 U. S. 483.

⁴¹ 260 U. S. 568.

for, or supply at wholesale rates the periodicals of other publishers, was a contract of agency and not of sale, and, therefore, not within the operation of the Clayton Anti-Trust Act.

In *Federal Trade Commission v. Sinclair Refining Co.*⁴² it was held that the furnishing by oil refiners to dealers of tanks and pumps without charge and at less than cost for hauling their oil on condition that, if the tanks or pumps should be used for the product of competitors, the right to use such equipment should cease, was not an unfair method of competition. "No purpose or power to acquire unlawful monopoly has been disclosed," said the court, "and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and to put gasoline on sale at the crossroads."

In *Federal Trade Commission v. Raymond Bros.-Clark Co.*⁴³ it was held that a wholesaler's refusal to purchase from a manufacturer unless he would discontinue selling to a competitor was not an unfair method of competition, the right of the individual to use a free discretion as to whom he would deal with being reaffirmed, no elements of monopoly or of other forms of oppression being disclosed. A different case would be presented, said the court, if the company against which the Federal Trade Commission had issued the order, should combine or agree with other wholesale dealers that none of them would trade with any manufacturer who sold to other wholesale dealers competing with themselves, or to retail dealers competing with their customers.

⁴² 261 U. S. 463.

⁴³ 263 U. S. 565.

CHAPTER XLIX

INTERSTATE COMMERCE AND LABOR

§ 561. Labor Provisions of the Clayton Act.

It is elsewhere pointed out¹ that, in the *Danbury Hatters* case,² the Sherman Act of 1890 was held to apply to combinations of, or conspiracies between, laborers and their associations in restraint of interstate trade. This decision, in 1908, was felt as a considerable blow by trade-unionists who feared that the very existence of trade-unions as legal organizations was thereby jeopardized.³ A campaign was, therefore, at once begun not only to place the unions upon a firmer legal basis, at least so far as Federal law was concerned, but to exempt them from what the trade-unionists conceived to be an undue control by the law and by the courts. This campaign led, in 1914, to the inclusion in the Clayton Act,⁴ of provisions relating to the issuance of injunctions in labor disputes (which will be later considered) and the following declaration regarding the status of labor, agricultural and horticultural organizations:

"Section 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the Anti-Trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

The foregoing declaration was received with great acclaim by the labor organizations, but their satisfaction was scarcely justified, as decisions of the Supreme Court were soon to show. Indeed, a critical scrutiny of the section of the act, as above quoted, shows that its language was so carefully guarded as to give to it no more than a declaratory force, that is, as stating existing law rather than as creating new law. The title of the act speaks only of "unlawful" restraints, and Section 6 declares that the anti-trust laws are not to be construed as forbidding or restraining the individual members of the organizations from "lawfully" carrying out

¹ §. 547.

² *Loewe v. Lawler* (208 U. S. 274).

³ See, for example, Mr. Gomper's statement in 21 *Federationist*, 35.

⁴ 38 Stat. L. 730.

the "legitimate" objects thereof. The most that can be said, therefore, of this section, in an affirmative way, is that it makes it certain that trade-unions are not, *per se*, that is, apart from what they are or what their members may do, to be deemed illegal as being combinations or conspiracies in restraint of trade. But, whatever may have been the early common law upon the subject, it is clear that, at the time the Clayton Act was passed, the courts had come definitely to the view that, apart from a statutory declaration to a contrary effect, trade-unions or other ordinary labor organizations were not to be deemed illegal associations or combinations. In this respect, then, the Clayton Act marked no advance in the law. In fact, no court had ever held that the Sherman Act condemned labor organizations as such. Upon the contrary, their legality had been affirmed by the Supreme Court. Thus, in *Adair v. United States*,⁵ the court had said: "Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of their members as wage-earners—an object entirely legitimate and to be commended rather than condemned." And, in *Gompers v. Buck's Stove and Range Company*⁶ the court had said: "The law . . . recognizes the right of workmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that comes from such associations. By virtue of this right, powerful labor unions have been organized."

As to the declaration of Section 6 that the labor of human beings was not to be deemed a commodity or article of commerce, all that can be said is that it has no meaning as a legal proposition. No court has ever held that labor is either a commodity or an article of commerce, and it is difficult to imagine how the courts could find it necessary either to deny or to affirm such a proposition.

It would appear, then, that, notwithstanding the Clayton Act, the activities of trade-unions can come within the prohibition of the Anti-Trust Act in so far as they have as their purpose, or effect, the monopolizing of, or the placing of restraints upon, interstate or foreign commerce. And the same is true as to the specific prohibitions contained in the Clayton Act itself. That act does, however, place important limitations upon the power of the courts to intervene in labor disputes by way of injunctive relief. The provisions of the Clayton Act with regard to this matter are as follows:

Section 16 provides expressly that injunctive relief may be granted by courts of competent jurisdiction in order to prevent irreparable threatened loss or damage by violations of the Federal anti-trust laws, with the proviso that only the United States is to be entitled to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Interstate Commerce Act of 1887 in respect of any matter subject to

⁵ 208 U. S. 178.

⁶ 221 U. S. 439.

the regulation, supervision or other jurisdiction of the Interstate Commerce Commission. The following sections of the act, however, the text of which is given in the footnote,⁷ specifies the conditions and circumstances under which injunctions may be issued.

⁷ SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided

§ 562. Anti-Trust Act Applied to Labor Associations.

The fact that the labor or trade-unions had, by the Clayton Act, gained no exemption from the operation of the Anti-Trust Acts, including the Clayton Act, has been made manifest in a number of important cases which have served to show the character of the acts of trade-unions which the Supreme Court deems lawful and those which it deems unlawful. These cases will be reviewed.

It will be remembered that in *Adair v. United States*,⁸ the court had held unconstitutional the act of Congress which had prohibited interstate carriers from discharging an employee because of his membership in a labor union. In *Coppage v. Kansas*⁹ the court held invalid, as a denial of due process of law, a State statute which forbade an employer to require of employees or of persons seeking employment an agreement not to become or remain a member of a trade-union. These decisions, so far as they went, were favorable to the interests of trade-unions. However, in *Lawler v. Loewe*,¹⁰ the court held that, irrespective of compulsion or agreement, the circulation by a union of a list of "unfair dealers" the manifest intention of which circulation was to dissuade possible customers from dealing with the dealers upon the list, combined with a purpose to boycott such dealers, was within the prohibition of the act of 1890. As stated in the opinion in this case, which was an action to recover treble damages under the act, the charge which the court held to be sustained was "that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by the manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other States, and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiffs' commerce with other States."

by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

Sec. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

⁸ 208 U. S. 161.

⁹ 236 U. S. 1.

¹⁰ 235 U. S. 522.

In *Hitchman Coal & Coke Co. v. Mitchell*,¹¹ the common law with reference to the determination of what may be deemed lawful or unlawful acts upon the part of trade-unions was again directed against the unions. In this case the officers of a union were restrained by an injunction from obtaining from employees secret promises to join a union although they had agreed with their employers to leave their employment in case they should join the union. This case did not involve the Federal Anti-Trust Act, but arose under the common law of the State of West Virginia. The case is, however, significant as indicating the attitude of the court as to what conduct is lawful upon the part of trade-unions. Also, in *Eagle Glass and Manufacturing Co. v. Rowe*¹² decided on the same day as the *Hitchman* case, the court held that the fact that employees may lawfully strike of their own volition does not justify the members of a trade-union to which such employees do not belong in instigating a strike upon their part, and that an injunction will properly lie to restrain the officers and members of the union from such instigation.

In *Paine Lumber Co. v. Neal*¹³ it was held that, under Section 4 of the act of 1890, the remedy of injunction to prevent damage arising out of a violation of the act could not be availed of by the private parties injured, but could be obtained only by the United States Government.

In *Duplex Printing Press Co. v. Deering*¹⁴ an injunction was asked by the Duplex Co. to restrain a course of conduct by Deering *et als.* as business agents of a branch of the International Association of Machinists, which, it was charged, amounted to a boycott against the products of the complainant's factory, and to a conspiracy to injure and destroy its business, and especially its interstate trade. As stated in the opinion of the court, "The acts complained of made up the details of an elaborate programme adopted and carried out by defendants and their organizations in and about the city of New York as part of a country-wide programme adopted by the International Association, for the purpose of enforcing a boycott of complainant's product. The acts embraced the following, with others: Warning customers that it would be better for them not to purchase, or, having purchased, not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company, usually employed by customers to haul the presses, not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing

¹¹ 245 U. S. 232.

¹³ 244 U. S. 459.

¹² 245 U. S. 275.

¹⁴ 254 U. S. 443.

union men, by threatening them with loss of union cards and with being blacklisted as 'scabs' if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses. In some cases the threats were undisguised; in other cases polite in form, but none the less sinister in purpose and effect."

These acts, the court found, constituted a "secondary boycott," that is, "a combination not merely to refrain from dealing with the complainant, or to advise or by peaceful means persuade complainant's customers to refrain ['primary boycott'], but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

This distinction between a primary and a secondary boycott the court declared to be material in determining the proper construction of the Clayton Act. "But," the court added, "in determining the right to an injunction under that and the Sherman Act, it is of minor consequence whether either kind of boycott is lawful or unlawful at common law or under the statutes of particular States. Those acts, passed in the exercise of the power of Congress to regulate commerce among the States, are of paramount authority, and their prohibitions must be given full effect, irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes."

After referring to, and quoting from its opinions in *Loewe v. Lawler*,¹⁵ and *Lawler v. Loewe*,¹⁶ the court said: "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition [of the Anti-Trust Act] as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute."

In this connection it is furthermore to be observed that, unlike what was true in the case of *Hitchman Coal and Coke Co. v. Mitchell*,¹⁷ there was no charge that the defendants had induced the employees of the complainant to violate agreements between themselves and him.

As to whether Section 20 of the Clayton Act should be deemed to operate to forbid the grant of an injunction under the circumstances stated, the court said: "The first paragraph [of that Section] merely puts into

¹⁵ 208 U. S. 274.

¹⁶ 235 U. S. 522.

¹⁷ 245 U. S. 232.

statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before."

As to the second paragraph of the section the court declared that it was clear that the restriction upon the use of the injunction was in favor only of those concerned as parties to the disputes as described. The lower Federal court in the instant case had held that the words "employers and employees" as used in Section 20 of the Clayton Act, referred to "the business class or clan to which the parties litigant respectively belong," and, therefore, that the members of the Machinists' Union, some 60,000 in number, although standing in no relation of employment under the complainant, past, present, or prospective, might make their own a dispute between the complainant and its employees, and proceed to institute sympathetic strikes or boycotts against employers wholly unconnected with the complainant's establishment, except as possible purchasers of its products in the ordinary course of interstate commerce, and this, too, in cases in which there were no disputes between themselves and their respective employees. This construction of Section 20, the Supreme Court declared to be "altogether inadmissible." The court continued: "Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war. 'Terms or conditions of employment' are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.

"Nor can section 20 be regarded as bringing in all members of a labor organization as parties to a 'dispute concerning terms or conditions of

employment,' which proximately affects only a few of them, with the result of conferring upon any and all members—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of section 20, which contain no mention of labor organizations, so as to produce an inconsistency with section 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization. At the same time it would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not favored, and in effect, as was noted in *Loewe v. Lawler*, 208 U. S. 274, 303, 304, would confer upon voluntary associations of individuals formed within the States a control over commerce among the States that is denied to the governments of the States themselves.

"The qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated as a violation of the laws of the United States.

"The emphasis placed on the words 'lawful' and 'lawfully,' 'peaceful' and 'peacefully,' and the references to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the anti-trust laws, or otherwise unlawful. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed 'peaceful and lawful' persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees."¹⁸

In *American Steel Foundries v. Tri-City Central Trades Council*,¹⁹ the court reaffirmed the view it had stated in *Duplex Printing Press* case, as to those who are to be deemed parties to disputes between employers and employees within the meaning of the Clayton Act. With reference to character of those acts for the restraining of which an injunction would properly lie, and those for the restraining of which, under the Clayton Act, the writ might not be issued, the court laid down so clearly its conception of the lengths that "picketing" might lawfully go that its language deserves quotation even at considerable length. The court said:

"It is clear that Congress wished to forbid the use by the Federal courts of their equity arm to prevent peaceable persuasion by employees, dis-

¹⁸ Justices Brandeis, Holmes and Clarke dissented.

¹⁹ 257 U. S. 184.

charged or expectant, in promotion of their side of the dispute, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best practice always. Congress thought it wise to stabilize this rule of action and render it uniform.

"The object and problem of Congress in section 20, and indeed of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other. If in their attempts at persuasion or communication with those whom they would enlist with them, those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court's duty which the terms of section 20 do not modify, so to limit what the propagandists do as to time, manner and place as shall prevent infractions of the law and violations of the right of the employees, and of the employer for whom they wish to work.

"How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free.

"The nearer this importunate intercepting of employees or would-be employees is to the place of business, the greater the obstruction and interference with the business and especially with the property right of access of the employer. . . . Each case must turn on its own circumstances."

So much the court said with regard to "picketing" and other actions amounting, in their effects, to force or intimidation. Regarding the right of a trade-union to induce laborers to leave their employment in order to secure better working conditions or compensation upon the part of its members who were or might be expected to become employees of the establishment against which this action was directed, the court pointed out that, in the instant case, although only one member of the unions of

the Trades Council was included in those who went out in the strike, it was probable that other members of the local unions were looking forward to employment when the Steel Foundries resumed full operation; and that thus, though not ex-employees within the Clayton Act, they were directly interested in the wages which were to be paid. Under these circumstances, asked the court, was the interference of the unions by persuasion to induce a strike against low wages a malicious and therefore unlawful one? "We think not," the court answered. "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. . . . The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious. The principle of the unlawfulness of maliciously enticing laborers still remains and action may be maintained therefor in proper cases, but to make it applicable to local labor unions, in such a case as this, seems to us to be unreasonable.

"The elements essential to sustain actions for persuading employees to leave an employment are, first, the malice or absence of lawful excuse, and, second, the actual injury." ²⁰

In *United Leather Workers Int. Union v. Herkert & Meisel Trunk Co.*²¹ the court, after an elaborate review of the cases, held that a strike against manufacturers intended by the strikers to prevent, and, in fact, preventing continued manufacture, was not brought within the operation of the Federal Anti-Trust Acts by reason of the fact that the commodities to be manufactured were to be shipped in interstate commerce. The Federal control would become, and could constitutionally become, operative only if the strikers should interfere, or seek to interfere, with the free transportation, delivery or sale of such commodities in other States.²²

²⁰ The court went on to analyze the cases of *Hitchman Coal & Coke Co. v. Mitchell* (245 U. S. 229) and *Duplex Printing Press Co. v. Deeming* (254 U. S. 443), and to distinguish them from the instant case.

²¹ 263 U. S. 457.

²² The court said as to the strike in this case which involved intimidation and violence in an industry ninety per cent of whose product was normally sold in interstate commerce: "The mere reduction in supply of an article to be shipped in interstate commerce,

§ 563. The Coronado Coal Case—Trade-Unions Held Suable.

The trade-unions were by no means satisfied with the results of the decisions which have been summarized, but they were still more disturbed when, by the decision of the Supreme Court in the case of *United Mine Workers of America v. Coronado Coal Co.*²³ in 1922, it was held that trade-unions, in view of the various acts of Congress recognizing their existence, were, though unincorporated organizations, legal entities that might be held responsible for their acts, and their funds subjected to execution upon judgments obtained in suits for torts committed by them in connection with illegal strikes engineered by them.

The court recognized that, at common law, unincorporated bodies are not regarded as having any other character than partnerships and can be sued only in the names of their members and liabilities enforced only against such members.²⁴ "But," the court went on to say, "The growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a *quasi*-trade-mark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the States, and in many States authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards. More than this, equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued, and this has had its influence upon the law side of litigation, so that out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported, in which no question has been raised as to the right to treat them in their

by the illegal or tortuous prevention of its manufacture is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control the price, or discriminate as between the would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."

²³ 259 U. S. 344.

²⁴ Citing *Pickett v. Walsh* (192 Mass. 572); *Kanges Furniture Co. v. Amalgamated Woodworkers Local Union* (165 Ind. 421); *Baskins v. United Mine Workers* (Ark.) (234 S. W. 464).

closely united action and functions as artificial persons capable of suing and being sued."

After citing the various Federal statutes in which the legal existence of labor organizations had been expressly recognized, the court said, "In this state of Federal legislation, we think that such organizations are suable in the Federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes. The fact that the Supreme Court of Arkansas has since taken a different view in *Baskins v. United Mine Workers of America*, *supra*, cannot under the Conformity Act operate as a limitation on the Federal procedure in this regard."

The court further pointed to the fact that Section 8 of the act of 1890 provided that the word "persons" whenever used in the act should be deemed to include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any Territory, the laws of any State, or the laws of any foreign State." The word "associations" the court declared, was broad enough to include all organizations whether incorporated or not, provided their existence had been recognized by law as lawful.

As to interference with interstate commerce being involved, the court said, "coal mining is not interstate commerce, and obstruction of coal mining though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it, or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred."

In *Michaelson v. United States ex rel. C., St. P., M. & R. Co.*²⁵ the court held that the mandatory provision of the Clayton Act with regard to trial by jury upon demand in contempt proceedings was constitutional in that the act related exclusively to proceedings for criminal contempt which, unlike proceedings for civil contempt, are independent proceedings and no part of the original causes in which they may have arisen. Were the statute construed to refer to proceedings for civil contempt, said the court, a more serious constitutional question would arise, namely, as to the right of Congress to control the courts in the exercise of a power inherent in them.²⁶

By the decision of the court in *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Assn.*²⁷ the trade-unions received what they have considered to be another serious set-back to their legal rights. In that case it was held that a general order of a stone-cutters' union directing its members

²⁵ 266 U. S. 42.

²⁶ For a further discussion of this point, see *post* § 1069.

²⁷ 274 U. S. 37.

not to work on stone which had been partly cut by non-union labor and which had been transported in interstate commerce, constituted an undue and unreasonable restraint of such commerce within the meaning of the Anti-Trust Act. That this prohibition operated upon the stone only after its physical interstate transportation had ended was held immaterial, since, as the court held, the interference had for its primary aim restraint of the interstate sale and shipment of the stone, and such restraint was the necessary consequence. The fact that the ultimate end aimed at by the Stone Cutters' Association was one which it was legal for it to seek, would not, said the court, justify, as a means to that end, the placing of such restraint upon interstate commerce.²⁸

²⁸ Justices Brandeis and Holmes dissented.

CHAPTER L

PACKERS AND STOCKYARDS ACT AND OTHER FEDERAL LEGISLATION UNDER THE COMMERCE CLAUSE

§ 564. Packers and Stockyards Act.

In *United States v. Union Stock Yard & Transit Co.*¹ it was held that a stockyard company with the usual facilities of such yards as to loading and caring for freight, and authorized to operate a railroad system, transporting cars to and from trunk lines in the course of their transportation from beyond the State and to points outside the State, was engaged in interstate commerce. The fact that a service was performed wholly in a State was declared irrelevant if it constituted a part of an interstate transportation transaction.

In the so-called Beef Trust case,² decided in 1905, it was declared that "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated."

By Section 15, paragraph 5 of the Interstate Commerce Act, as amended June 29, 1906, June 18, 1910, and February 28, 1920, it was provided that:

"Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments in suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The [Interstate Commerce] Commission may prescribe or approve just and reasonable rules governing each of such excepted services."

¹ 226 U. S. 286.

² *Swift & Co. v. United States* (196 U. S. 275).

This provision indicated a control of the stockyards by Congress under its commerce power further than that covered by the Sherman Anti-Trust Act of 1890.

By the Packers and Stockyards Act of August 15, 1921,³ Congress has provided for the supervision by Federal authority of the business of commission men and livestock dealers in the great stockyards of the country. For the purposes of the act a transaction is declared to be commerce if the article concerned "is part of that current of commerce usual in the live stock and meat packing industries, whereby live stock, meats, meat food products, live stock products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of live stock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act."

For the purposes of this paragraph the word "State" is declared to include Territories, the District of Columbia, possessions of the United States, and foreign nations.

Packers are defined to be persons "engaged in the business (a) of buying live stock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing live stock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, live stock products, dairy products, poultry, poultry products, or eggs, in commerce"—that is, in commerce as defined in the paragraph previously quoted.

The act goes on to forbid packers, as thus defined to: "(a) Engage in or use any unfair, unjustly discriminatory or deceptive practice or device in commerce; or (b) make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or (c) sell or otherwise transfer to or for any other packer, or buy or otherwise receive from or for any other packer, any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in

³ 42 Stat. at L. 159. The title of the Act reads as follows: "An Act to Regulate Interstate and Foreign Commerce in Live Stock, Live Stock Products, Poultry, Poultry Products, and Eggs, and for Other Purposes."

commerce; or (d) sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce, or (e) engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or (f) conspire, combine, agree, or arrange with any other person, (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article of commerce, or (3) to manipulate or control prices in commerce; or (g) conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act unlawful by subdivision (a), (b), (c), (d), or (e)."

In short, the act seeks to subject packers to a regulation closely resembling that provided by the Sherman Anti-Trust Act of 1890 for other persons engaged in, or by their acts affecting, interstate commerce.

The enforcement of the act is placed in the hands of the Secretary of Agriculture, who is directed to cause complaints in writing to be served upon packers who he has cause to believe have violated or are violating the provisions of the act, followed by hearings and with the right of other persons, for good cause, to intervene in the proceedings. If, as a result of such proceedings, the Secretary finds that the packer has violated or is violating the act, he is directed to serve upon the packer an order to discontinue such violations. This order is to be final and conclusive unless, within thirty days, the packer appeals to the Circuit Court of Appeals for the district in which he has his principal place of business, praying that the order be set aside or modified, together with such bonds as the court may require. At any time after the filing in the court of the transcript of the proceedings, the court may, on application of the Secretary, issue a temporary injunction restraining the packer, to the extent deemed proper, from violating the order pending the final determination of the appeal. In such appeal, the court may affirm, modify, or set aside the order of the Secretary, and its order is to operate as an injunction to restrain the packer and his officers, directors, agents and employees from violating the provisions of the order as affirmed or modified.

The jurisdiction of the Court of Appeals in the premises is declared to be exclusive and its decree is to be final except as subject to review by the Supreme Court of the United States, upon certiorari, as provided in Section 240 of the Judicial Code, but the issue of such writ is not to operate as a stay of the decree of the Circuit Court of Appeals unless so ordered by the Supreme Court.

Failure of the packer or of his officers, agents or employees, to obey the

order of the Secretary is declared punishable by a fine of not less than \$500 nor more than \$10,000, or imprisonment for not less than six months nor more than five years, or both; and each day of such failure to obey continues is to be deemed a separate offence.

As to stockyards, after defining stockyard services as "services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock"; and stockyards as places "conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce," the act directs the Secretary of Agriculture to give notice to owners of such stockyards as he deems to come within the purview of the act, and declares that no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary his name and address, the character of his business and the kinds of stockyard services, if any, he furnishes at such stockyards.

The act declares that "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard": that the rates or charges for such services shall be "just, reasonable, and non-discriminatory,"—unjust, unreasonable, and discriminatory charges being prohibited and declared unlawful. Schedules of all rates and charges are to be posted and filed with the Secretary for public inspection,—the manner and form of such schedules to be determined and prescribed by the Secretary.

Whenever there is filed with the Secretary a new rate or charge or regulation affecting rates or charges, the Secretary, upon his own initiative or upon complaint, may, without answer or formal pleadings by the person filing such schedules, but upon reasonable notice, "enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice," and, pending such hearing and decision thereon and the filing of a statement in writing of his reasons therefor, may suspend the operation of the schedule for a period not longer than thirty days beyond the time when it would otherwise have gone into effect; and, after full hearing, may make such order with reference thereto as would have been proper had the proceeding been initiated after the schedule had become effective. If necessary to enable the hearing to be concluded, this suspension may be extended another thirty days.

Failure to abide by schedules of rates or charges, or orders of the Secretary is made punishable by a penalty of not more than \$500 for each offence and not more than \$25 for each day the offence continues, which penalties are to accrue to the United States and be recoverable by civil actions brought by the United States. Wilful failure to comply with the fore-

going provisions of the act or regulations or orders of the Secretary is declared punishable, on conviction, by a fine of not more than \$1000, or imprisonment of not more than one year or both.

Any person complaining of anything done or omitted to be done by any stockyard owner or market agency in violation of the act or orders of the Secretary thereunder, may file his complaint with the Secretary who thereupon shall call upon the parties complained of to answer. If the complaint is not satisfied, the Secretary may investigate the matters complained of, in the manner and by such means as he deems proper, or the Secretary may make inquiries on his own motion. "If, after hearing, the Secretary determines that the complainant is entitled to damages, he may make an order directing that the sum be paid by the party complained of. If this order is not obeyed, the party for whose benefit the order is made, may file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a suit to recover such damages. In this suit the findings and orders of the Secretary are to be deemed *prima facie* evidence of the facts therein stated.

If, after full hearing of a complaint, or upon hearings instituted by the Secretary upon his own motion, the Secretary is of opinion that any rate, charge, regulation or practice of a stockyard owner or market agency is unjust, unreasonable or discriminatory, he may prescribe what shall be the rate to be charged, or the maximum or minimum, or maximum and minimum, and the regulations or practices to be observed.

The act further provides that if, as the result of any investigations, the Secretary finds that any rate, regulation or practice of a stockyard owner or market agency, with reference to matters not in commerce of live stock, that is, commerce as defined in the act, "causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in live stock on the one hand and interstate or foreign commerce in live stock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in live stock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination."

Stockyard owners, market agencies, and dealers are forbidden to use any unfair, unjustly discriminatory, or deceptive practices or devices in connection with the interstate commercial business carried on by them. Failure to obey orders of the Secretary are penalized, and the Attorney General directed to prosecute for the recovery of forfeiture to the United States.

If orders of the Secretary are not obeyed, the United States, by its

Attorney General or any party injured thereby, may apply to the Federal district court for their enforcement, which court, after hearing duly had, may issue a writ of injunction or other proper process, mandatory or otherwise.

For the purpose of the foregoing, "the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary."

Similarly "for the efficient execution of the provisions of this act, and in order to provide information for the use of Congress," the provisions (including penalties) of Sections 6, 8, 9, and 10 of the Federal Trade Commission Act of September 26, 1914, are made applicable to the jurisdiction, powers and duties of the Secretary of Agriculture.

It is expressly declared that nothing contained in the Packers and Stockyards Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

As regards the Federal Trade Commission, however, it is declared that that Commission shall have no power or jurisdiction so far as relates to any matter which is made by the Packers and Stockyards Act subject to the jurisdiction of the Secretary of Agriculture.

In *Stafford v. Wallace* ⁴ the constitutionality of this act as a regulation of interstate commerce was upheld, the court saying: "The stockyards are not a place of rest or final destination. . . . The stockyards are but a throat through which the current flows. . . . Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are one essential in making the sales, without which the flow of the current would be obstructed, and this whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. . . . The principles of the *Swift* case [*Swift v. United States*, 196 U. S. 375] have become a fixed rule of this court in the construction and application of the commerce clause. Its latest expression is found in *Lemke v. Farmers' Grain Co.*, 257 U. S. . . . In that case, it was held on the authority of the *Swift* case, that the delivery and sale of wheat by farmers to local grain elevators in North Dakota, to be shipped to Minneapolis, when practically all the wheat purchased by such elevators was so shipped, and the price fixed by that in the Minneapolis market, less profit and freight, constituted a course of business, and determined the interstate character of the trans-

⁴ 258 U. S. 495.

action. Accordingly, a State statute which sought to regulate the price and profit of such sales and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause." Continuing, the court said that if, as had been held, Congress could provide for the punishment or restraint of conspiracies in restraint of interstate trade, it could certainly provide regulation to prevent their formation.

§ 565. Agricultural Associations Exempted from Anti-Trust Acts.

By act of February 18, 1922,⁵ it is provided "that persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: "First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum; And, in any case, to the following: Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

It is, however, further provided that if the Secretary of Agriculture has reason to believe that any such association is monopolizing or restraining trade in interstate and foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve notice upon the association to show cause why an order shall not issue directing it to cease from such monopolization or restraint, and, if, after a hearing had, it be found that such monopolization or restraint exists, the Secretary shall issue an order, reciting the facts, and directing the association to cease from such monopolization or restraint. On request of the association, or of the Secretary, in case the order is not obeyed, the Federal District Court of the judicial district where the association has its principal place of business is given jurisdiction, after hearing had, to enter a decree affirming, modifying, or setting aside the order, or to enter such other decree as the court may deem equitable. The facts found by the Secretary of Agriculture and recited in his order are to be deemed *prima facie* evidence of such facts, but either party may adduce additional evidence.

⁵ 42 Stat. at L. 388.

§ 566. "Future Trading" and Interstate Commerce.

In *Chicago Board of Trade v. Christie G. & S. Co.*⁶ it was held that contracts with telegraph companies by a Board of Trade limiting the communication of quotations of prices on sales of grain and provisions for future delivery, collected by the Board, does not amount to, or attempt the establishment of, a monopoly, and are not contracts in restraint of trade either at common law or under the Federal Anti-Trust Acts.

In *United States v. New York Coffee and Sugar Exchange*,⁷ in line with the Christie case, it was held that sales of sugar for future delivery under contracts providing for actual delivery on an exchange, and, in connection therewith, of a clearing association for offsetting purchases against sales, was not a conspiracy on the part of the Exchange and clearing association to restrain trade in violation of the Anti-Trust Act, in the absence of evidence that the exchange and the clearing house had produced, or had attempted to produce, a disturbance of the market, although other persons might have conspired to use the operations of the exchange and the clearing association to cause a rise in the price of sugar.

However, in *United States v. Patten*,⁸ it was held that a conspiracy to effect a "corner" in the available supply of a staple commodity like cotton, which is normally the subject of interstate commerce, and to accomplish this by means of purchases for future delivery, coupled with the withholding from sale for the time being of such amounts purchased and thereby enhancing the price of the commodity to all buyers, was a conspiracy within the terms of the Anti-Trust Act of 1890. The court said: "It may well be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition. Of course the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, when the trade or commerce affected is interstate unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view."

§ 567. Cotton Futures Act.

By act of August 18, 1914,⁹ Congress sought to regulate, by means of an excise tax, dealings in sales of cotton for future delivery at Cotton Ex-

⁶ 198 U. S. 236.

⁷ 263 U. S. 611.

⁸ 226 U. S. 525.

⁹ 38 Stat. at L. 693.

changes. This Act was replaced by the "Cotton Futures Act" which constituted part of the Agricultural Appropriation Act of August 11, 1916.¹⁰

§ 568. Grain Future Trading Act.

By act of August 24, 1921,¹¹ a tax of 20 cents a bushel was imposed on all contracts for the sale of grain for future delivery, but there were excepted from its application sales on boards of trade, designated as contract markets by the Secretary of Agriculture, on fulfillment by such boards of certain prescribed conditions and requirements. The constitutional validity of this act was contested in *Hill v. Wallace*¹² upon the ground that, though sought to be supported as a regulation of interstate and foreign commerce, it had no direct relation thereto. This contention, the Supreme Court upheld, and the law declared void upon the same ground that, in *Bailey v. Drexel Furniture Co.*,¹³ the Child Labor Tax Law had been held invalid. The court said: "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of Boards of Trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal consisting of that Secretary, the Secretary of Commerce, and the Attorney General. Indeed, the title of the act recites that one of its purposes is the regulation of Boards of Trade. The court, therefore, refused to support the act as a revenue measure of the Federal Government. Also, it could find no support for it as a regulation of interstate or foreign commerce. Said the court: 'There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words 'interstate commerce' are not to be found in any part of the act from the title to the closing section. . . . A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind, and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.

"In *Ware & Leland v. Mobile County*, 209 U. S. 405, it was held that contracts for the sales of cotton for future delivery which do not oblige interstate shipments are not subjects of interstate commerce, and that a State tax on persons engaged in buying and selling cotton for future delivery was held not to be a regulation of interstate commerce or beyond the power of the state.

"It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce. They cannot come within the regulatory power of Congress as such, unless they are regarded by

¹⁰ 39 Stat. at L. 476. Amended March 4, 1919, 40 Stat. at L. 1351.

¹¹ 42 Stat. at L. 187.

¹² 259 U. S. 44.

¹³ 259 U. S. 20.

Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon. *United States v. Ferger*, 250 U. S. 199. It was upon this principle that in *Stafford et al. v. Wallace et al.*, 258 U. S. 495, decided May 1, 1922, we held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, because Congress had concluded that through exorbitant charges, dishonest practices, and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through.”¹⁴

§ 568a. Grain Futures Act of 1922.

On September 21, 1922¹⁵ Congress enacted a new Grain Futures Act. This statute was avowedly enacted by Congress as an exercise of its power to regulate interstate commerce, and its purpose declared to be the prevention of obstructions and burdens upon that commerce, and, to that end, imposed regulations upon the buying and selling of grain on boards of trade or through other exchanges or associations. In *Board of Trade of Chicago v. Olsen*,¹⁶ this law was distinguished from the one held void in *Hill v. Wallace*,¹⁷ and its constitutional validity, as a regulation of interstate commerce, upheld. The former law had made no pretence of being in regulation of, or limited in its application to, interstate commerce. The present act, the court said, “purports to regulate interstate commerce and sales of grain for future delivery on boards of trade because it finds that by manipulation, they have become a constantly recurring burden and obstruction to that commerce. . . .

“It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfilment of future contracts, from the current of stock shipments declared to be interstate commerce in *Stafford v. Wallace*, 258 U. S. 495. That case presented the question whether sales and purchases of cattle made in

¹⁴ The court pointed out that there were certain provisions of the act which were not before it in the instant case which might not be open to constitutional objection, and, as to these, it expressed no opinion. In *Truder v. Crooks* (269 U. S. 475) the court held that Section 3 of the act being a mere feature, without separate purpose, had to share the invalidity of the major part of the act which had been declared void in *Hill v. Wallace*. The imposition of this section, the court declared, was a penalty and in no proper sense a tax. “This conclusion seems inevitable,” said the court, “when consideration is given to the title of the act, the price usually paid for such options, the size of the prescribed tax (20 cents per bushel), the practical inhibition of all transactions within the terms of section 3, the consequent impossibility of raising any revenue thereby, and the intimate relation of that section to the unlawful scheme for the regulation under guise of taxation.”

¹⁵ 42 Stat. at L. 998.

¹⁶ 262 U. S. 1.

¹⁷ 259 U. S. 44.

Chicago at the stockyards by commission men and dealers and traders, under the rules of the stockyards corporation, could be brought by Congress under the supervision of the Secretary of Agriculture, to prevent abuses of the commission men and dealers in exorbitant charges and other ways, and in their relations with packers prone to monopolize trade and depress and increase prices thereby. It was held that this could be done even though the sales and purchases by commission men and by dealers were, in and of themselves, intrastate commerce, the parties to sales and purchases and the cattle all being at the time within the city of Chicago."

§ 569. Air Commerce Act of 1926.

During recent years a considerable number of the States of the Union have enacted laws in regulation of the use of the air above their several areas by aircraft. It was not until May 20, 1926, however, that a general Federal law was passed.¹⁸ Various constitutional sources for Federal authority in the premises were, at various times, discussed, and, among them the maritime and admiralty jurisdiction,¹⁹ but the measure finally enacted was based upon the power of Congress to regulate interstate and foreign commerce.²⁰

Under this act, which is entitled "An Act to Encourage and Regulate the Use of Aircraft in Commerce and for Other Purposes," "Air Commerce" is defined to mean "transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of a business, or navigation of aircraft from one place to another for operation in the conduct of a business."

For the promotion of such commerce, it is declared to be the duty of the Secretary of Commerce to encourage the establishment of airports, civil airways, and other air navigation facilities; to make recommendations to the Secretary of Agriculture as to necessary meteorological service; to study the possibilities for the development of air commerce and aeronautical industry and trade in the United States; and collect and disseminate information relative thereto and to the existing state of the art; to advise with the Bureau of Standards and other executive agencies of the Federal Government in carrying forward research and development

¹⁸ 44 Stat. at L. 568. There had been earlier laws relating to naval and military and other governmental aircraft.

¹⁹ Of course, under its military powers, Congress can exercise and has exercised. control of aviation in its military and naval aspects. Aviation in its international aspects is subject to Federal regulation under the Treaty power, and the United States has signed the International Air Navigation Convention of October 13, 1919, but, for some reason or other, this Convention has not been submitted by the President to the Senate for its approval, and, therefore, the Convention is not in force, at least so far as the United States is concerned.

²⁰ A good discussion of this act by Mr. Frederic P. Lee, Legislative Counsel to the United States Senate, is to be found in the *American Bar Association Journal*, June, 1926.

work in air navigation; to investigate, record and make public the causes of accidents in civil air navigation in the United States; and to exchange with foreign governments information pertaining to civil air navigation.

For the regulation of air commerce, provision is made for the registration of aircraft owned by citizens of the United States or by corporations or associations organized under the laws of the United States or of a State of the Union, of which the president and two-thirds or more of the directors or other managing officers are citizens of the United States, and in which at least fifty-one per centum of the voting interest therein is controlled by persons who are citizens of the United States or of its possessions. Such registration is optional and not mandatory. No aircraft registered under the laws of any foreign country may be registered under this law.

The Secretary of Commerce is directed to provide regulations for the rating of aircraft as to their airworthiness, and he may require periodical examination of such aircraft and of the airmen operating them, and provide for the issuance, expiration, suspension or revocation of aircraft and airmen certificates. He is also directed to "establish air traffic rules for the navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft."

By Section 4 of the act, "The President is authorized to provide by executive order for the setting apart and the protection of airspace reservations in the United States for national defense or other governmental purposes, and, in addition, in the District of Columbia, for public safety purposes. The several States may set apart and provide for the protection of necessary airspace reservations in addition to and not in conflict either with airspace reservations established by the President under this section or with any civil or military airway designated under the provisions of this Act."

Section 5b further provides: "The Secretary of Commerce is authorized to designate and establish civil airways, and, within the limits of available appropriations hereafter made by Congress, (1) to establish, operate, and maintain along such airways all necessary air navigation facilities except airports, and (2) to chart such airways and arrange for publication of maps of such airways, utilizing the facilities and assistance of existing agencies of the Government so far as practicable. The Secretary of Commerce shall grant no exclusive right for the use of any civil airway airport, emergency landing field, or other air navigation facility under his jurisdiction."

It is to be noted that, by Section 6 of the act, Congress asserts for the United States exclusive and complete sovereignty of the airspace over the United States and the Canal Zone. The section reads: "Section 6. Foreign Aircraft. (a) The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete

sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone.²¹ Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State. (b) Foreign aircraft not a part of the armed forces of the foreign nation shall be navigated in the United States only if authorized as hereinafter in this section provided; and if so authorized, such aircraft and airmen serving in connection therewith, shall be subject to the requirements of Section 3, unless exempt under subdivision (c) of this section. (c) If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Secretary of Commerce may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States, and may by regulation exempt such aircraft, and/or airmen serving in connection therewith, from the requirements of Section 3, other than the air traffic rules; but no foreign aircraft shall engage in interstate or intrastate air commerce.”²²

By Section 7 of the act the Secretary of the Treasury is authorized to designate places in the United States as ports of entry for civil aircraft from foreign countries and for merchandise carried on such aircraft; and the Secretary of Labor is given similar authorization with reference to aliens arriving in the United States by aircraft.

To aid the Secretary of Commerce in the exercise of his duties under the act, provision is made for an additional Assistant Secretary of Commerce to be appointed by the President by and with the advise and consent of the Senate.

It has been noted above that registration of aircraft is optional, not mandatory, but, by Section 11 of the act, it is provided, with suitable penalties for violations attached, that it shall be unlawful, except to the extent authorized under Section 6, as earlier quoted,—

“(1) To navigate any aircraft within any airspace reservation otherwise than in conformity with the Executive orders regulating such reservation.

²¹ It may be observed that, whereas, under its lease of the Canal Zone, the United States has without doubt the right to assert the right to exercise exclusive jurisdiction over the airspace over the Zone, it is doubtful whether it can assert “sovereignty” thereover, unless, indeed, it be held that the United States, as lessee of the Zone, has actual sovereignty thereover.

²² It will be noted that Congress, by this last clause asserts authority to regulate intrastate commerce in so far as the exclusion of foreign aircraft therefrom is concerned. Such Federal regulatory authority has, no doubt, been conceived to be constitutionally justified as an exercise by the United States of its comprehensive right to regulate and control the international relations of the United States.

It is also to be observed that the term “United States” as used in this and other sections of the act includes the Territories and possessions of the United States and the District of Columbia.

"(2) To navigate any aircraft (other than a foreign aircraft) in interstate or foreign commerce unless such aircraft is registered as an aircraft of the United States; or to navigate any foreign aircraft in the United States.

"(3) To navigate any aircraft registered as an aircraft of the United States, or any foreign aircraft, without an aircraft certificate or in violation of the terms of any such certificate.

"(4) To serve as an airman in connection with any aircraft of the United States, or any foreign aircraft, without an airman certificate or in violation of the terms of any such certificate.

"(5) To navigate any aircraft otherwise than in conformity with the air traffic rules."

With regard to the air traffic rules, it is to be observed that, by this last provision, they are made to apply to all aircraft, whether registered or not, or whether or not engaged in commerce, interstate, intrastate or foreign.

§ 570. Radio Act of 1927.

By the Radio Act of February 23, 1927,²³ Congress has made elaborate and detailed provision regarding the sending of interstate and foreign radio communications. By Section 1, the act is declared to have for its purpose, "to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited portions of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."

Except under, and in accordance with, the provisions of this act, it is further declared by Section 1: "That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from any place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State where the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communica-

²³ 44 Stat. at L. 1162.

tions, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communication, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States."

By Section 2 of the act, a Federal Radio Commission, composed of five members appointed by the President with the advice and consent of the Senate, is provided for. This Commission is authorized, by Section 4, to classify radio stations; to prescribe the nature of the service to be rendered by each class of stations and each station within the class; to assign bands of frequencies or wave lengths to each class of stations and to individual stations; to determine the location of stations; to regulate the kinds of apparatus to be used; to make regulations to prevent interference between stations; to establish areas or zones to be served by any station; to make special regulations applicable to stations engaged in chain broadcasting; to make regulations requiring stations to keep records of transmissions; to exclude from regulations, in whole or in part, radio stations upon railway rolling stock; to hold hearings, compel testimony, etc.

However, by Section 5, it is provided that one year after the first meeting of the Commission all the powers and authority vested in the Commission by the act, except as to the revocation of licenses, are to be vested in and exercised by the Secretary of Commerce, who, henceforth, is to refer to the Commission for its action any application for a station license, or for the renewal or modification of an existing license, or conflict relating thereto; to prescribe the qualifications of station operations and to classify them; to suspend licenses upon grounds which are specified; to inspect all transmitting apparatus in order to ascertain whether in construction or operation they conform to the requirements of the act or of rules or orders issued thereunder; to report to the Commission violations of the act or of rules or regulations issued thereunder; to designate call letters of all stations and cause such call numbers to be published. This section further provides that any person aggrieved by any decision or order of the Secretary may appeal to the Commission, which is authorized thereupon to hear the appeal *de novo* under such rules and regulations as it may determine. Decisions by the Commission as to matters so appealed and as to all other matters over which it is given jurisdiction are to be final, except as subject to the right of appeal to the courts as provided by the act (Section 16).

Radio stations belonging to and operated by the Government are exempted from the regulations which have been described. These stations are to use such frequencies or wave lengths as are assigned to them by the President (Section 6). Furthermore, "upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster

or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any Department of the Government under such regulations as he may prescribe, upon just compensation to the owners."

Radio stations on board vessels of the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation or the Inland and Coastwise Waterways Service are declared subject to the provisions of the act.

Detailed provisions are made by the act for the granting, refusing, modifying, suspending or revoking of licenses, which do not need to be here summarized. It may, however, be mentioned that licenses are to be refused to parties found guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize radio communications through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or of having used unfair methods of competition. The fact that the party has a license is not to estop the United States from proceeding against a party who is charged with using unfair methods of competition or with having violated the anti-trust laws of the United States.

It is also provided (Section 14) that the Commission shall revoke the license of any party certified to it by the Interstate Commerce Commission as having been guilty of making unjust or discriminatory charges or services, or having failed to provide reasonable facilities for the transmission of radio communications.

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade are declared applicable to the manufacture and sale of, and to trade in, radio apparatus and devices entering into or affecting interstate or foreign trade or to interstate or foreign radio communications.

The act contains many other specific provisions which it is not feasible here to summarize. The provisions which have been described are, however, sufficient to disclose the scope and importance of the act.

CHAPTER LI

NAVIGABLE WATERS AND THE COMMERCE POWER

§ 571. Federal Control of Navigable Waters under the Commerce Power.

In a later chapter will be considered the Federal powers, both judicial and legislative, which flow from the provision of Section 2, Article III of the Constitution, which provides that the Federal judicial power shall extend "to all cases of admiralty and maritime jurisdiction." It will there appear that, under this grant of authority, the National Government has been construed to have a general authority over all acts directly connected with or occurring upon the navigable waters of the United States. These navigable waters have been construed to be all waters, whether tidal or not, and whether located wholly within a single State or not, which are navigable in fact, or are susceptible of being so used in themselves or as connecting links, as highways over which trade and travel may be conducted between the States or with foreign nations. Navigability has thus been accepted as the essential test of Federal admiralty jurisdiction. It is thus apparent that the Federal authority thus obtained is a more comprehensive one, territorially or spatially speaking, than that derived from the Commerce Clause.

It will also be seen, when dealing with the matter of Federal admiralty and maritime jurisdiction, that it is established that such jurisdiction carries with it a full legislative power upon the part of Congress to provide the law to be applied. This legislative power, as declared in *Re Garnet*,¹ "is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."

It has already appeared in the sections dealing with the definition of interstate and foreign commerce, that commerce includes navigation as one of its essential elements. It thus results that, with reference to the regulation of navigable waters, Congress draws its legislative power from a double source:—from Section 2 of Article III of the Constitution vesting admiralty and maritime jurisdiction in the Federal Government, and from the Commerce Clause. In the one case, however, the authority is rather, though not exclusively, to fix the law governing transactions with reference to or upon navigable waters; in the other, to determine the conditions under which the waters shall be navigated and to protect or to increase their navigability. The line between the two powers is, however, by no

¹ 141 U. S. 1.

means clear and thus much of the legislation of Congress with reference to the navigable waters of the United States has been constitutionally defensible either as falling within the Federal authority in matters of admiralty and maritime jurisdiction or as included within the power of Congress to regulate interstate and foreign commerce. In certain cases, moreover, still other sources of Federal constitutional authority with reference to rivers, streams and lakes have appeared. This has been the case when Congress has dealt with waters lying within, or flowing through, the public lands of the United States, and when the matter of irrigating these lands has been involved; or when Congress has dealt with waters lying within the Territories; or when the war powers of Congress have been involved, or the field of international relations has been entered. In the present sections, however, we shall deal with navigable waters only in so far as the commerce power is concerned.

That navigation is included within the commerce subject to Federal regulation was fixed once for all in *Gibbons v. Ogden*.² In *Gilman v. Philadelphia*,³ the extent of the power of Congress to legislate under the Commerce Clause with reference to navigation is thus described: "The power to regulate commerce comprehends control, for that purpose and to the extent necessary, of all the navigable waters of the United States, which are accessible from a State other than those in which they lie. For this purpose, they are the public property of the Nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England. It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanction which shall be provided."

Although, as will be seen from the quotation that has just been made, the court said that the navigable waters may be regarded as "the public property of the Nation" when the matter of maintaining their navigability is concerned, there has never been any question that, except when situated within the public lands of the United States, the Federal Government has no proprietary rights in them; nor indeed, does, its sovereignty extend over them to the exclusion of that of the States in which they may be situated. Thus, aside from the matter of maintaining or promoting their navigability and of regulating navigation thereon, the National Government has no constitutional authority to exercise municipal jurisdiction over them, or

² 9 Wh. 1.

³ 3 Wall. 713.

to claim a property interest in their beds or banks, or to assert riparian rights in their waters, except, of course, in so far as the United States may itself happen to be the owner of lands through which the waters may flow. In other words, the United States may exercise an authority over these waters only in so far as interstate or foreign commerce, including the maintenance and promotion of their navigability, is concerned.

This proposition may be said to have been fully settled, if, indeed, it were previously in doubt, by the holding of the court in *Kansas v. Colorado*.⁴

In that case it was recognized that the jurisdiction of the States over waters within their limits is subject only to the limitation that their navigability shall not be interrupted or hindered. Of the contention on behalf of the Federal Government that it might appropriate State waters in order to irrigate its own lands, the court said: "It is enough for the purpose of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters" [citing many cases].

It [a State] may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State."

In the comparatively recent case of *International Bridge Co. v. New York* ⁵ was involved the extent of jurisdiction of the State over a bridge the construction of which has been authorized or sanctioned by the United States. This case related to a bridge, international in character in the sense that one of its termini was in the State of New York and the other upon Canadian soil. The suit was one brought by the State of New York against the bridge company to recover penalties for failure upon the part of the company to conform to certain requirements of a law of the State. The bridge had been originally constructed under State authority, and it was held by the Supreme Court that the sanction for its construction as a lawful bridge by the United States did not exclude any control thereof by the State. The court said: "The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by State

⁴ 206 U. S. 46.

⁵ 254 U. S. 126.

law. Not only the existence of the Company but its right to build upon New York land came from New York, as was recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built 'in pursuance of' the New York statutes.

"From an early date the State has been recognized as the source of authority in the absence of action by Congress. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Escanaba Co. v. Chicago*, 107 U. S. 678. And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises. In a case of navigable waters wholly within a State, over which a right of way had been conveyed to the United States and which the United States was spending considerable sums to improve, it was held that, whether or not Congress had power to authorize private persons to build in such waters without the consent of the State, an act making comprehensive regulations of work within them did not manifest a purpose to exclude the previously existing authority of the State over such work. *Cummings v. Chicago*, 188 U. S. 410.

"But it is said that a different rule applies to an international stream and that Congress has recognized the distinction by the act of March 3, 1899, c. 425, Sec. 9, 30 Stat. 1151. It is true that that statute makes a distinction, but the distinction is that bridges may be built across navigable waters wholly within the State if approved by the Chief of Engineers and the Secretary of War, but, with regard to waters not wholly within the State, only after the consent of Congress has been obtained. The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant

"No doubt in the case of an international bridge the action of a State will be scrutinized in order to avoid any possible ground for international complaint, but the mere fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure if Congress were silent, any more than the fact that it was a passageway for interstate commerce or crossed a navigable stream. When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw State control, but on the contrary an assumption that the control is to remain."

In *Port of Seattle v. Oregon and Washington R. Co.*⁶ the court said: "The right of the United States in navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right [the State of] Washington became, upon its organization as

⁶ 255 U. S. 56.

a State, the owner of the navigable waters within its boundaries and of the land under the same.⁷ . . . The character of the State's ownership in the land and in the waters is the full proprietary right. . . . Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same is a matter wholly of local law."⁸

§ 572. Navigable Waters Defined.

In the *Daniel Ball*,⁹ the court defined the public navigable waters of the United States in the following terms: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are so used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

Artificial waterways, such as canals, have also been judicially held to come within the definition of public navigable waters of the United States if they satisfy the other conditions as above enumerated.¹⁰

Whether or not a stream or other water is a navigable water of the United States would seem to be a question for final Federal determination.¹¹

In *Economy Light and Power Co. v. United States*,¹² a dam had been built without the consent of Congress, and without its location and plans having been submitted to and approved by the Chief of Engineers and Secretary of War as provided by Federal statute, and the defence was that the stream in which the dam had been built was not in fact a navigable one. The Supreme Court made its own examination as to this, and held that "a river having actual navigable capacity in its natural state, and capable of carrying commerce among the States, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use

⁷ Citing *Weber v. State Harbor Comrs.* (18 Wall. 57).

⁸ Citing *Shively v. Bowlby* (152 U. S. 1).

⁹ 10 Wall. 557.

¹⁰ See *Ex parte Boyer* (109 U. S. 629); and *Perry v. Haines* (191 U. S. 17).

¹¹ A broad statutory definition of what shall be deemed to constitute the navigable waters of the United States is to be found in the Federal Water Power Act of 1920. See *post*, § 574.

¹² 256 U. S. 113.

according to present methods, either by reason of changed conditions or because of artificial obstructions." This doctrine was applied to the Des Plaines river although for a hundred years it had not been used for commerce. The court said: "A hundred years is a brief space in the life of a nation; improvements in the methods of water transportation, or increased cost in other methods of transportation, may restore the usefulness of this stream; since it is a natural interstate highway, it is within the power of Congress to improve it at the public expense, and it is not difficult to believe that many other streams are in like condition and require only the exertion of Federal control to make them again important avenues of commerce among the States. If they are to be abandoned, it is for Congress not the court, so to declare."

What is to be deemed an obstruction to navigation is a matter for determination by Congress. In *United States v. Chandler-Dunbar Water Power Co.*¹³ the court said: "So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstruction and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control."

§ 573. Federal Legislation Concerning Navigable Waters.

By various acts Congress has from time to time provided for the protection against interruption of navigable waters, as, for example, for the removal of obstructions to navigation, for the alteration of bridges over navigable streams, as directed by the Secretary of War, requiring that the permission of the Secretary of War shall be obtained for the building of bridges over, and dams or other structures in, the channels of navigable waters, or the alteration of such channels, etc. In fact, Congress has forbidden every obstruction in navigable waters unless express affirmative Federal authorization therefor has been given.¹⁴ Thus, by the act of 1899,¹⁵ it is provided that: "It shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, That such structures may be built under authority of the legislature of a State across rivers and other

¹³ 229 U. S. 53.

¹⁴ For an elaborate account of this legislation see the monograph of J. G. Kerwin, *Federal Water Power Legislation*, published in 1926 by the Columbia University Press.

¹⁵ 30 Stat. at L. 1151.

waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced." The same act further declares: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited."

By the act of June 21, 1906,¹⁶ it is provided that thereafter any authority granted by Congress to any persons to construct and maintain a dam for water power across any of the navigable waters of the United States shall not be exercised until the plans and specifications for its construction have been submitted to and approved by the Chief of Engineers and the Secretary of War.

§ 574. Federal Water Power Act of 1920.

Directly connected with the authority of the United States to protect and improve the navigability of waters of the United States is the question whether, as incidental thereto, the United States may develop, or authorize the development of, water power, and derive a revenue by the sale or lease of the same to private parties. These questions have been sharply raised by the Federal Water Power Act of June 10, 1920.¹⁷

The purpose of this act is declared to be "to create a Federal Power Commission to provide for the improvement of navigation, the development of water power, the use of the public lands in relation thereto, and to repeal Section 18 of the River and Harbor Appropriation Act, approved August 8, 1917,¹⁸ and for other purposes." It establishes a Commission, operating through the Departments of War, Interior and Agriculture, which is authorized to investigate and collect data "concerning the utilization of the water resources of any region to be developed, the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act."

The Commission is further authorized: "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power

¹⁶ 34 Stat. at L. 386.

¹⁷ 41 Stat. at L. 1063.

¹⁸ This section had provided for a Waterways Commission to formulate plans for developing water resources for navigation.

houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam." Various provisos are added, among them being one that "no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War."

The licensees are to pay to the United States reasonable annual charges, in an amount to be fixed by the Commission, "for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached."

By Section 14 of the act it is provided that upon not less than two years' notice, or upon the expiration of a lease, the United States may itself take over and operate a project.

The act is a long and detailed one, and cannot be here summarized. It is, however, important to note the definition given in Section 3 to the term "navigable waters." These are declared to be: "Those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

As regards the constitutional points raised by this act, it may be said that it is reasonably clear that, except in cases in which the United States itself has riparian rights by reason of being the proprietor of the lands through which the waters flow, or has gained such rights by grant from a State,¹⁹ Congress has no authority from the Commerce Clause or any other clause of the Constitution to construct plants on streams, whether navi-

¹⁹ This was the case in *Green Bay Co. v. Patten* (172 U. S. 58).

gable or not, for the primary purpose of collecting and distributing water for the purpose of providing mechanical power or for furnishing water for irrigation purposes. The doctrine of *Kansas v. Colorado*²⁰ would seem to establish this proposition. The more disputed question, however, is whether the United States, as incidental to the improvement of the navigation of streams, may develop water power which it may itself use or from which it may derive a revenue by lease to other parties.

A case which comes the nearest to supporting an affirmative answer to this question is that of *United States v. Chandler-Dunbar Water Power Co.*²¹ This case is also important as determining that the proprietary right of holders of fast land upon the shores of navigable waters to the bed of such waters, may be subordinated to the right of the United States to maintain or improve the navigability of such waters. As to such right the court said: "It is subordinate to the public right of navigation, and however helpful in protecting the owner against the act of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. . . . All means having some positive relation to the end in view [navigation] which are not forbidden by some other provision of the constitution are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation."

In this case, with respect to the constitutionality of Section 12 of the act of 1909 which had authorized the Secretary of War to lease, upon terms agreed upon, any excess of water which might result from the conservation of the flow of the river and from the works which the Government might construct, the court said: "If the primary purpose is legitimate [i. e. for the improvement of navigation], we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments."²²

This reference to the practice of the States seems hardly calculated to support a similar practice upon the part of the United States, since the States do not, as does the National Government, have to find a source for the exercise of a power in some specific power constitutionally vested in it. At best, however, the case is authority for the developing and leasing of water power by the General Government when this is but incidental to structures erected or authorized by it for the primary purpose of conserving or improving the navigability of the streams in which such structures are

²⁰ 206 U. S. 46.

²¹ 229 U. S. 53.

²² Citing *Kaukauna Water Power Co. v. Green Bay and M. Canal Co.* (142 U. S. 254).

placed. It thus may easily be that the Supreme Court will not uphold the validity of operations under the Federal Water Power Act of 1920 which it determines to have for their primary purpose the development or conservation of water power rather than the protection or improvement of navigation.

As yet the constitutionality of the Water Power Act has not been passed upon by the Supreme Court. In *New Jersey v. Sargent*,²³ a bill in equity was brought by the State against the Attorney General of the United States and members of the Federal Power Commission to enjoin the enforcement of the act upon the ground of its unconstitutionality. The court found, however, that there was no showing that the State was engaged, or was about to engage, in any work or operation which the act purports to restrict or prohibit, and, therefore, that what was asked for was, in effect, a declaratory judgment as to the validity of the act. Upon this ground the action was dismissed.²⁴

²³ 269 U. S. 328.

²⁴ Upon the authority of *Georgia v. Stanton* (6 Wall. 50); *Mayre v. Parsons* (114 U. S. 725); *Muskra v. United States* (219 U. S. 346); *Texas v. Interstate Commerce Commission* (258 U. S. 158); and *Massachusetts v. Mellon* (262 U. S. 447).

CHAPTER LII

EXCLUSION OF PERSONS AND COMMODITIES FROM INTERSTATE AND FOREIGN COMMERCE BY THE FEDERAL GOVERNMENT

In exercise of its power to regulate interstate and foreign commerce, Congress has, in a considerable number of instances, excluded certain persons and commodities from transportation in such commerce. In this chapter this legislation, together with the questions of constitutional competence in connection therewith, will be discussed. It will be found that the crucial constitutional question is as to whether the regulatory power of Congress in the premises is broad enough to warrant that body in exercising the right of exclusion in order to obtain results which have no real relation to the safety or convenience of interstate and foreign transportation;—in other words, whether the power is an arbitrary one, except as the matter of due process of law may be involved.

§ 575. Commerce and Postal Powers Distinguished as to Right of Exclusion.

The cases in which it has been held that the Federal Government has a full discretionary power to exclude articles from the mails cannot be used to support, by analogy, a similar power over interstate commerce. For, by the Constitution, Congress is given the exclusive power to establish post-offices or post-roads. The maintenance of a postal service is thus a subject over which the States have no authority. Interstate commerce is, however, a matter which is not established by the Federal Government. Its regulation, and not its creation, by the Federal Government, is provided for by the Constitution. The distinction between the powers of the United States with reference to interstate commerce and those arising out of its power to establish post-offices and post-roads is recognized in the leading case of *Ex parte Jackson*¹ in which the court said: "We do not think that Congress possesses the power to prevent the transportation in other ways as merchandise of matter which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes of articles which legitimately constitute mail matter in the sense in which those laws were used when the Constitution was adopted—consisting of letters and newspapers and pamphlets when not sent as merchandise—but further than this, its powers of prohibition cannot extend."

¹ 96 U. S. 727.

§ 576. The Power to Exclude from Foreign Commerce Distinguished from the Power to Exclude from Interstate Commerce.

Though, as is elsewhere pointed out, there have been statements by the Supreme Court of the United States that the control which Congress may exercise over interstate commerce is as plenary in character as that which it may exercise over foreign commerce, the fact is that these statements are true only in so far as they relate to the grant of legislative authority contained in the Commerce Clause, for, as regards foreign commerce, the Federal Government has extensive powers of regulation derived from the fact that it has plenary and exclusive control of the foreign relations of the United States, that is, of all subjects which, according to the usage of nations, are treated as matters of international significance, or which, whatever may have been the usage of States, are, in fact, of international concern. There is, of course, no dispute that the matter of foreign trade, whether by way of exports or imports of commodities, and the passing of persons from one sovereign territorial jurisdiction to another sovereign territorial jurisdiction, whether by way of emigration or of immigration, are matters the regulation of which come within the sphere of Foreign Relations. Hence, it results that the Federal Government has a control of foreign commerce, both of persons and of commodities, independently of the Commerce Clause, and that, in the exercise of that power, thus independently possessed, the United States, whether through the treaty or the legislative power, may, according to its own conception of what good public policy dictates, exclude persons and commodities from the commerce of the United States with foreign Powers. It is clear, then, that, from the right of Congress to exclude articles or persons from foreign commerce, one cannot argue a similar power with reference to interstate commerce. This caution is implied by the Supreme Court in its opinion in *Buttfield v. Stranahan*² when it says: "Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion."

Later on in the same opinion, the court said: "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so

² 192 U. S. 470.

broad in character as to limit and restrict the power of Congress to determine what articles of commerce may be imported into this country and the terms on which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution.”³

It is clear, then, that, short of such an arbitrary exercise of power as might operate, as to particular individuals, as a denial of due process of law, the Federal Government has a power to exclude articles or persons from foreign commerce that is plenary in character, and which may be exercised in order to enforce any public policy that the United States may see fit to adopt. The right of the Federal Government to exclude from interstate commerce must, however, be defended upon other and distinct constitutional grounds.

§ 577. Exclusion from Interstate Commerce.

That the power to regulate includes, in certain cases at least, the right of Congress to exclude certain classes of persons or of commodities from interstate commerce, has never been doubted.

Thus, the right to exclude from interstate commerce commodities like explosives, which are dangerous to export, unless packed in certain specified ways; or of infected goods which may contaminate other goods, is undoubted. Such measures clearly are of a reasonable regulative character, and relate directly to the carrying on of interstate transportation. They are, in this respect, similar to the laws requiring the railroads to employ safety devices and to adopt various operative methods with a view to the prevention of accidents.⁴

§ 578. Intoxicating Liquors and Interstate Commerce.

There has been considerable Federal legislation, based upon the Commerce Clause, some of which has involved the exclusion, under certain circumstances, of intoxicating liquors. Most of this legislation has now been superseded by the acts of Congress in enforcement of the Eighteenth

³ For the relation of due process of law to the regulation of commerce see Chapter CI.

⁴ As to infected articles see the Cattle Quarantine Acts of February 2, 1903 (32 Stat. L. 791) and March 3, 1905 (33 Stat. at L. 1264). As to the transportation of different kinds of virus, of serums and toxins, see the act of March 4, 1913 (37 Stat. at L. 828). As to unmarked nursery stock, see the act of August 20, 1912 (37 Stat. L. 315). As to uninspected meats, see the act of June 30, 1906 (34 Stat. at L. 674). As to dangerous caustic or corrosive substances, see the Act of March 4, 1927 (44 Stat. at L. 1406).

The foregoing acts are in the nature of quarantine acts and their main purpose is undoubtedly that of protecting the peoples of the communities to which the articles are to be transported. There is, however, present a sufficient element of danger of infecting other goods which are being transported to make it possible to regard these measures as relating to the safety of interstate transportation itself.

Amendment to the Constitution. However, the cases in which the constitutionality of these earlier measures was considered are still valuable because of the doctrines declared in them by the Supreme Court with reference to the forms of regulation of interstate commerce which Congress may constitutionally employ, as well as with regard to the power of the States, in the effort to enforce their own policies of regulating the sale and use of intoxicating liquors, which may affect, even if they do not directly control, the interstate transportation of such liquors.

In *Mugler v. Kansas* ⁵ certain liquor laws of the State were held not to violate the due process clause of the Fourteenth Amendment.

In the License cases ⁶ the constitutionality of the liquor laws of a number of the States was considered both with reference to the Fourteenth Amendment and the Commerce Clause, and, upon the whole, a considerable power on the part of the States to regulate the sale of imported liquors, was recognized.

But in *Bowman v. Railroad* ⁷ the court explained that it had not, in the License cases, passed squarely upon the application of State laws to liquors brought into the States from outside, and, in the case at bar, held invalid, as a regulation of interstate commerce, a law which forbade any common carrier to bring intoxicating liquors within the State from any other State or Territory, without first obtaining a certificate from the proper State officials that the consignees were licensed by the State to sell such liquors.

The argument of the court was that the statute in question was neither an inspection law, nor a police measure confining its direct operation to domestic goods, or to imported goods after they had become commingled with, and therefore a part of, the general goods of the State. The court said: "It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same would justify any and every other

⁵ 123 U. S. 623.

⁶ How. 504.

⁷ 125 U. S. 465.

State regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations. . . .

“ . . . It may be said, however, that the right of the State to restrict or prohibit sale of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it.”

§ 579. The Wilson Act.

The position taken by the Supreme Court in the *Bowman* and succeeding cases very seriously crippled the powers of the States to control the sale of intoxicating liquors within their borders. That their efficiency in this respect might be, at least partially, restored to them, Congress, in 1890, passed the so-called Wilson Act,⁸ which provided: “That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police power to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.” The constitutionality, if not the desirability, of such a measure as this had been suggested to the court by Justice Matthews in the opinion in the *Bowman* case in which he had said: “So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress.” And in *Leisy v. Hardin*, Chief Justice Fuller had said: “Hence inasmuch as interstate commerce . . . is national in its character and

⁸ 26 Stat. at L. 313.

must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammelled."

In *Re Rahrer*⁹ the Wilson Act was held constitutional, but not, as had been suggested by Justices Matthews and Fuller, as a delegation by Congress to the States of a power to regulate interstate commerce to the extent provided. This, the court held, Congress might not do, the principle *delegatus non potest delegare* governing. The law might, however, it was declared, be construed as an express negation by Congress of the conclusion to be presumed from its previous silence that interstate commerce, to the extent covered by the Wilson Act, should be free from State interference or control.¹⁰

In short, it was held that the State liquor prohibition laws, in their application to interstate commerce, previously declared void, had been so declared not because of the inherent constitutional incompetence on the part of the States to enact them, but because Congress, by its silence, had declared that interstate commerce as to intoxicating liquors should be free from State interference.

⁹ 140 U. S. 545.

¹⁰ "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things, and that not only may intoxicating liquors be imported from one State into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result. Thus the grant to the General Government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment, afforded by confiding its regulation exclusively to Congress. By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the General Government substituted. . . . But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property. . . . Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The reasoning employed by the court in the *Rahrer* case has been severely criticized as casuistical, but no disposition has been since exhibited by the court to repudiate it.

§ 580. Construction of the Wilson Act.

The Wilson Act permitted the State to control the sale of imported intoxicating liquors only when such control is exercised as a police measure.

In *Scott v. Donald*¹¹ the court held that the South Carolina Dispensary law did not come within the permission of the act, because, while not forbidding the manufacture, sale, or use of intoxicating liquors, it yet attempted to restrain the introduction of such liquors into the State from other States and Territories. This, the court declared, could not properly be described as a police measure.¹²

Nor, said the court, could the measure be upheld as an inspection law; for "the prohibition of the importation of wines and liquors of other States by citizens of South Carolina for their own use is made absolute and does not depend on the purity or impurity of the articles."

In *Rhodes v. Iowa*¹³ it was held that the terms of the Wilson Act subjecting articles of interstate commerce to State police authority "upon arrival" in such State meant, not upon crossing the State lines, but upon the consummation of their shipment, that is, delivery to the parties to whom consigned. In this case it was, therefore, held that the moving of certain consignments of liquor from the platform of the railway station to the freight warehouse, was a part of interstate commerce transportation and done before the State law could constitutionally attach to the goods thus moved.

In *Scott v. Donald* the court had said that the Dispensary law "is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquor, as detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope of the opera-

¹¹ 165 U. S. 58.

¹² "It is not a law purporting to forbid the importation, manufacture, sale or use of intoxicating liquors as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. . . . The question whether a given State law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors to be valid. But the State cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

¹³ 170 U. S. 412.

tion of the Wilson Act." This had generally been understood as intimating that only State laws totally prohibiting the manufacture and sale of intoxicating liquors within the State would be held to come within the provisions of the Wilson Act. In *Vance v. Vandercook*,¹⁴ however, the court held that because a State law permits the sale of liquors subject to particular restrictions it does not follow that the law is not a police measure and held, therefore, that the law was within the permissive provisions of the Wilson Act. Also it was held that the State law was not discriminative against interstate commerce because it gave to State authorities an exclusive right to purchase all liquor sold in the State, which right they might employ to purchase from whomsoever they might please.

The State law was, however, held invalid in so far as it attempted to prevent the residents of the State from importing liquors for their own use, the permission of the Wilson law being held to extend only to the prohibition of the sale in original packages of importations of intoxicating liquors. And, in fact, it was declared that Congress could not constitutionally give to the States this power to prohibit importation of goods for the importer's own use, because, as the opinion declared, this right "is derived from the Constitution of the United States and does not rest on the grant of the State law."¹⁵

The court having decided that a State could not, even when aided by the provisions of the Wilson Act, prevent its inhabitants from importing liquors for their own use and consumption, the question soon arose whether this principle would, notwithstanding State prohibition laws, validate C. O. D. shipments of liquors, that is, express consignments of liquors which were to be paid for on delivery. It was argued that as to these the nature of the contract fixed the place of sale at the residence of the consignees and made the express company the agent of the consignors, and that the sale of liquor being within the control of the State, the express company thereby became liable to the penalties of the State prohibition laws.

In *Adams Express Co. v. Iowa*,¹⁶ however, the court declared the question as to when title to the liquors passed to be irrelevant, the material point being whether, in point of fact, interstate commerce could be said

¹⁴ 170 U. S. 438.

¹⁵ Commenting upon this last statement, Justice Shiras, Chief Justice Fuller, and Justice McKenna declared that, once concede that Congress may authorize the State to forbid the sale of original packages, it would, by a parity of reasoning, follow that Congress might permit the States to forbid importation for use. As a matter of fact, however, these justices denied that Congress could do either and asserted that the permission of the Wilson Act was intended to apply only to those cases in which the States, as a police measure, should find it necessary to declare that the use of intoxicating liquors of any kind is against morality, good health and the safety of the community, and wholly to prohibit their manufacture and sale.

¹⁶ 196 U. S. 147.

to be interfered with. This they declared would result from an attempt on the part of the States to restrain or punish the delivery of such C. O. D. shipments. After observing that there was a diversity of opinion as to when title to C. O. D. shipments passes, the court said: "But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted interstate commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another State so as to invalidate a lawful contract as to interstate commerce made in such other State; and, indeed, would require us to go yet further, and say that, although, under the interstate commerce clause, a citizen in one State had a right to have merchandise consigned from another State delivered to him in the State to which the shipment was made, yet that such right was so illusory that it only obtained in cases where, in a legal sense, the merchandise contracted for had been delivered to the consignee at the time and place of shipment."¹⁷

In *Pabst Brewing Co. v. Crenshaw*¹⁸ it was held that, under the operation of the Wilson Act, a State inspection law was valid which provided for an inspection of beer and other malt liquors shipped into the State and held there for sale or consumption. The fact that an inspection fee was

¹⁷ "When it is considered," the opinion continued, "that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one State to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the States which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery. It would prevent the citizen of one State from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the State where made, to the laws of another State; and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the Commerce Clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

The opinion further declared that the point involved had, in fact, been substantially decided in *Caldwell v. North Carolina* (187 U. S. 622) and *Norfolk, etc., R. Co. v. Sims* (191 U. S. 441).

¹⁸ 198 U. S. 17.

charged which was greater than the cost of the inspection itself, and that this inspection which was provided was inadequate as a protection against fraud or impurity, was held immaterial.¹⁹

Furthermore, the court held immaterial the fact that the operation of the State law was or might be such as to deter importations into the State. As to this the majority justices said: "If, when a State has but exerted the power lawfully conferred upon it by the act of Congress, its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor; yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious working of our constitutional system has been made possible."²⁰

¹⁹ The court said: "Conceding that the law in question may be inadequate to accomplish the purpose designed, and produces a large revenue to the State over and above the cost of inspection, this affords no Federal ground upon which to hold that the police power of the State would not be brought into play in making the enactment where the law does not operate upon a subject within the Federal control. This becomes evident when it is borne in mind that, whether the statute be regarded as a prohibition, as a regulation, as a license, or as an inspection law, if it encroached upon the Federal authority it would be void, and, on the contrary, in all or any of these aspects the law would be valid, so far as the federal Constitution is concerned, if it did not so encroach. The purpose of the Wilson Act was to make liquor after its arrival a domestic product, and to confer power upon the States to deal with it accordingly. The police power is, hence, to be measured by the right of a State to control or regulate domestic products, a State, and not a Federal question as respects the Commerce Clause of the Constitution. So far as the State aspect is concerned, the matter is foreclosed by a decision of the supreme court of Missouri passing upon the validity, under the State Constitution of the law now under consideration."

²⁰ In a strong dissenting opinion three justices agreed that the law in question should have been held void. They denied that the law could rightly be sustained as an inspection law, for it did not provide for an adequate inspection, or that it was a legitimate police measure, for it did not afford protection against fraud or impurity; and finally, they emphasized the fact that the inspection fee charged was excessive, being thirty times the cost of inspection. "A disproportion so gross," they said, "can only be accounted for upon the theory that the act was intended for the purposes of revenue and not for inspection." As to the application of the Wilson Act the dissenting justices said: "The act does not affect the right of inspection, since the right was one which existed wholly independent of the act, and had been applied and recognized ever since the case of *New York v. Miln* (11 Pet. 102) as one of the ordinary police powers of the State, which it was at liberty to exercise quite irrespective of any Federal statute for the protection of the health of its citizens. The Wilson Act neither creates, adds to, takes from, nor affects, the police powers of the State with respect to inspection in any particular. The power of the State to enact inspection laws, provided that such laws are intended

In *Heymann v. Southern R. Co.*²¹ it was held that the delivery of the interstate shipment of intoxicating liquors to their consignees is essential to constitute their "arrival" within the meaning of the Wilson Act, and also that the mere placing of such a shipment in the carrier's warehouse to await delivery to the consignee does not constitute arrival.²²

in good faith for the protection of the people, and not as a covert means for raising revenue by exorbitant charges, remains precisely as it was before the act was passed. . . . While we may concede that the liquors in this case had arrived at their destination, it does not follow that they were subject to any law which the State chose to pass in an assumed exercise of the police power. The State has an undoubted right to inspect all goods arriving therein, but it does not follow that it has the right to subject them to an inspection which is no inspection at all, and charge them with a fee out of all proportion to the costs of even a proper inspection, and to call it an exercise of the police power. Though these liquors had arrived at their destination, the State provided that, by § 5 of the act, they should be inspected before offering them for sale and before they had been commingled with the general mass of property. The fact that they had been delivered to the consignee was of no materiality, since the act which the State required should be done was one which applied a condition precedent to their admission to the State for commercial purposes. Until this act was performed, they were protected against an unlawful interference. This inspection might have taken place at the State line, but, for the convenience of the State officers, as well as that of the brewers, it was postponed until the arrival at their destination, as is frequently the case in foreign countries, where imported goods are not examined at the frontier, but at Paris or London, upon their arrival there; but they are not legally entered until such examination takes place. To say that their character as interstate commerce existed at the State line, but had been lost upon their arrival at their place of destination before they had shown themselves entitled to enter the State, is to apply a test wholly irrelevant under the circumstances. . . . If the inspection were not a *bona fide* exercise of the police power, it was an unlawful interference with such commerce. Whether the inspection was made at the State line, or at the destination of the goods, is absolutely immaterial. . . . The consequences of this decision seem to me extremely serious. If the States may, in the assumed exercise of police powers, enact inspection laws, which are not such in fact, and thereby indirectly impose a revenue tax on liquors, it is difficult to see any limit to this power of taxation, or why it may not be applied to any other articles brought within the State, and the cases of *Minnesota v. Barber*, 136 U. S. 313, and *Brimmer v. Rebman*, 138 U. S. 78, be practically overruled. The Wilson Act does not give the legislature any greater authority with respect to the inspection of liquors, and, as already observed, it leaves the question of inspection where it found it. If the Wilson Act receives its natural application—that is, of meeting the exigency created by our decision in *Leisy v. Hardin*, and enabling the States to enforce their prohibitory liquor laws upon the arrival of the liquor within the State, as we have repeatedly held,—the law has a definite and distinct value, and is readily understood."

²¹ 203 U. S. 270.

²² The court said: "As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce, by allowing the State power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular State, the liability

In *Delamater v. South Dakota* ²³ the application of the doctrine declared in *Vance v. Vandercook* was limited in its application to orders for liquor placed by the individual consumer, and the authority of the States upheld to impose an annual license charge upon the business of selling or offering for sale within the State by traveling salesmen intoxicating liquors in quantities less than five gallons which are to be brought into the State from outside. In this case it was strenuously argued that inasmuch as the liquor thus sold had not arrived and been delivered in the State, it could not be held to come within the terms of the Wilson Act. As to this the court said: "This is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson Act, State authority did not extend over liquor shipped from one State to another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one State to exert its authority in another State by preventing the delivery of liquor embraced by transactions made in such other State. The proposition here relied on is widely different, since it is that, despite the Wilson Act, the State of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals related to liquor situated in another State. But the business of soliciting proposals in South Dakota was one which that State had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course, if the owner of the liquor in another State had the right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original package, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate

of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several States concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the Commerce Clause of the Constitution." The court, however, added that they did not decide "if the goods of the character referred to in the Wilson Act moving in interstate commerce, arrive at the point of destination, and, after notice and full opportunity to receive them, are designedly left in the hands of the carrier for an unreasonable time, that such conduct on the part of the consignee might not justify if affirmatively alleged and proven, the holding that goods so dealt with have come under the operation of the Wilson Act, because constructively delivered."

²³ 205 U. S.

commerce. But as by the Wilson Act the power of South Dakota attached to intoxicating liquors when shipped into that State from another State after delivery but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other States, cannot be held to be repugnant to the Commerce Clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson Act did not exist."

It was also argued in this case that it having been decided in *Vance v. Vandercook* that, notwithstanding the Wilson Act, the State had no right to prohibit the importation of liquor by a resident for his own use and consumption, it, therefore, followed that the State might place no burden upon the solicitation of orders of liquors for such purpose. To this, however, the court replied, that between the right of the individual to import goods from another State or to make a contract for such importation, and the right of a person or company to carry on the business of soliciting such contracts there is a wide difference; and that previous decisions of the court had established that while the former could not be interfered with or restrained by the States, the latter could be. Thus it had been held that a State might regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents,²⁴ but that the States might not prohibit a citizen from making a contract of insurance in another State.²⁵

In *Adams Express Co. v. Kentucky* ²⁶ it was held that the agreement of the local agent of the express company to hold for a few days a C. O. D. interstate shipment of liquor to suit the convenience of the consignee did not

²⁴ *Hooper v. California* (155 U. S. 648).

²⁵ *Allgeyer v. Louisiana* (165 U. S. 578); *Nutting v. Massachusetts* (183 U. S. 553).

After quoting from *Nutting v. Massachusetts*, the court said: "The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the powers of the State in respect thereto. As we have seen, the right of the States to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson Act is applicable to liquor shipped from one State into another, after delivery, and before the sale in the original package. It follows that the authority of the States, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the States to forbid agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the State 'would not have thought of making' must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

²⁶ 206 U. S. 129.

destroy the character of the transaction as interstate commerce and render the company liable to prosecution under a State liquor law. Also, it was held that evidence that the express company knew that the C. O. D. shipment of liquor had not been ordered by the consignee was immaterial in a criminal prosecution where the indictment averred that the company was engaged in the business of a common carrier and shipment and delivery were made in the usual course of its business.

In *Louisville and Nashville R. Co. v. F. W. Cook Brewing Co.*²⁷ it was held that a carrier incorporated under the laws of a State could not refuse to accept shipments of intoxicating liquors from outside the State into the State where a law prevailed making the transportation of such shipments unlawful, because such law was void as an unconstitutional regulation of interstate commerce. The court laid down the following propositions as having been firmly established by previous decisions: "a. That beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce; b. That it is not competent for any State to forbid any common carrier to transport such articles from a consignor in one State to a consignee in another; c. That, until such transportation is concluded by delivery to the consignee, such commodities do not become subject to State regulation, restraining their sale or disposition. The Wilson Act, which subjects such liquors to State regulation, although still in the original packages, does not apply before actual delivery to such consignee, where the shipment is interstate."

§ 581. The Webb-Kenyon Act.

In 1913 Congress passed the Webb-Kenyon Act²⁸ over the veto of President Taft. This act was entitled "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases." Because of its brevity it may be quoted in full.

"That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the

²⁷ 223 U. S. 70.

²⁸ 37 Stat. at L. 699.

United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.”²⁹

Despite the opinion that had been expressed by President Taft and by others that the Webb-Kenyon Act was unconstitutional, it was accepted and applied by the Supreme Court in *Adams Express Co. v. Kentucky*³⁰ without discussion of its constitutionality beyond a reference to *Re Rahrer*.³¹ However, in *Clark Distilling Co. v. Western Maryland R. Co.*³² the court did examine with more care the question of constitutional validity, and said: “It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce, and therefore had prevented all movement between the several States, such action would have been lawful, because within the power to regulate which the Constitution conferred. *Lottery Case (Champion v. Ames)*, 188 U. S. 321; *Hoke v. United States*, 227 U. S. 308. The issue, therefore, is not one of an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but of a want of power to reach the result accomplished because of the method resorted to for that purpose. This is certain since the sole claim is that the act was not within the power given to Congress to regulate because it submitted liquors to the control of the States by subjecting interstate commerce in such liquors to present and future State prohibitions, and hence, in the nature of things, was wanting in uniformity. Let us test the contentions by reason and authority. . . .

“The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits State prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of State prohibitions would cease the instant the act of Congress ceased to apply. . . .

“ . . . So far as uniformity is concerned, there is no question that the

²⁹ President Taft vetoed the Webb-Kenyon Bill, but his veto was overridden by both Houses of Congress by large majorities. In his veto message President Taft, after quoting from the opinion of the Supreme Court in *Louisville and Nashville R. Co. v. F. W. Cook Brewing Co.* (233 U. S. 70), and referring to other cases, Federal and State, said: “If Congress, however, may in addition entirely suspend the operation of the inter-State-commerce clause upon a lawful subject of inter-State commerce and turn the regulation of inter-State commerce over to the States in respect to it, it is difficult to see how it may not suspend inter-State commerce in respect to every subject of commerce wherever the police power of the State can be exercised to hinder or obstruct that commerce. I can not think that the framers of the Constitution, or that the people who adopted it, had in mind for a moment that Congress could thus nullify the operation of a clause whose useful effect was deemed so important and which in fact has contributed so much to the solidarity of the Nation and the prosperity that has followed unhampered, nation-wide trade.”

³⁰ 238 U. S. 190.

³¹ 140 U. S. 545.

³² 242 U. S. 311.

act uniformly applies to the conditions which call its provisions into play,—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself. But, aside from this, it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it; that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one State to prevent the use of interstate commerce to ship liquor from another State, Congress exceeded its authority to regulate.”³³

By the so-called “Reed” or “Bone Dry” Amendment to the Post Office Appropriation Act of March 3, 1917,³⁴ Congress declared that no letter, postal card, circular, newspaper, pamphlet or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind, or containing a solicitation of orders for such liquors should be deposited in or carried by the mails of the United States or delivered by any postmaster or letter carrier when addressed to any person or corporation or other addressee at any place in any State or Territory³⁵ of the United States “at which it is by the law in force in the State or Territory at the time unlawful to advertise or solicit orders for such liquors, or any of them, respectively.” Furthermore, that “Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory, the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State.”

We are not here concerned with the validity of this legislation so far as it related to the United States mails. As affecting interstate commerce, the act was upheld in *United States v. Hill*.³⁶

In the lower court it had been held that, by the Reed Amendment, Congress had sought to aid the local law by preventing shipment of intoxicating liquors in interstate commerce when intended for commercial purposes,

³³ For approval of the doctrine of *Clark Distilling Co. v. Western Maryland R. Co.*, see *Seaboard Air Line Ry. v. North Carolina* (245 U. S. 298).

³⁴ 39 Stat. at L. 1058, at page 1069.

³⁵ By another Reed Amendment (40 Stat. at L. 1151), the District of Columbia was included.

³⁶ 248 U. S. 420.

and that, therefore, it did not apply to the bringing into a State of liquors intended for purely personal use. This construction of the Amendment, the Supreme Court declared, was too narrow. After referring to the fact, that, as decided in the Pipe Line cases,³⁷ the transportation of one's own goods from State to State is interstate commerce, and that the same is true as to the interstate transportation upon the person of intoxicating liquors, as decided in *United States v. Chavez*,³⁸ the court said: "Congress in the passage of the Reed Amendment must be presumed to have had, and in our opinion undoubtedly did have, in mind this well-known and often declared meaning of interstate commerce. It had already provided in the Wilson Act for State control over liquor after its delivery to the consignee in interstate commerce. In the Webb-Kenyon Act it had prohibited the shipment of liquor in interstate commerce where the same was to be used in violation of the law of the State into which it was transported. In the passage of the Reed Amendment it was intended to take another step in legislation under the authority of the commerce clause (article 1, § 8, cl. 3). The meaning of the act must be found in the language in which it is expressed, when, as here, there is no ambiguity in the terms of the law. The order, purchase, or transportation in interstate commerce, save for certain excepted purposes, is forbidden. The exceptions are specific and are those for scientific, sacramental, medicinal, or mechanical purposes; and in the proviso it is set forth that nothing contained in the act shall authorize interstate commerce shipments into a State contrary to its laws."

As to the constitutionality of the Reed Amendment, as thus construed, after referring to and quoting from its opinion in *Clark Distilling Co. v. Western Maryland R. Co.*³⁹ the court said: "In view of the authority of Congress over the subject-matter, and the enactment of previous legislation embodied in the Wilson and Webb-Kenyon Laws, we have no question that Congress enacted this statute because of its belief that in States prohibiting the sale and manufacture of intoxicating liquors for beverage purposes the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce, except for the limited purposes permitted in the statute which have nothing to do with liquor when used as a beverage. That the State saw fit to permit the introduction of liquor for personal use in limited quantity in no wise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make the prohibition against interstate shipment contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the State, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy."

³⁷ 234 U. S. 548.

³⁸ 228 U. S. 525.

³⁹ 242 U. S. 311.

§ 582. Lottery Tickets.

By act of March 2, 1895,⁴⁰ Congress provided that "any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement, of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable," etc.

With the exclusion from the mails of lottery tickets and advertisements relating thereto, we are not here concerned, but, as regards their transportation in interstate commerce, the law raised the important question whether it was within the constitutional power of Congress to exclude from such commerce commodities the transportation of which involved no danger to the persons or other property engaged in such commerce. That the real purpose of the act was to discourage a type of business or enterprise of which Congress disapproved, but over which, within the States, it had no direct powers of regulation, was not denied. The question, then, was, whether the measure could be constitutionally defended as an exercise of power granted by the Commerce Clause. In the case of *Champion v. Ames*⁴¹ the court answered this question in the affirmative.

A preliminary question was as to whether lottery tickets might properly be held to be articles of commerce. As to this the court said: "Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are the ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States?" As to the argument that lottery tickets have not, in themselves, any real value, and, therefore, cannot be regarded as subjects of interstate commerce, the court said: "If that were conceded to be the only legal test as to what are to be deemed subjects of interstate commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. . . . These tickets were the subject of traffic; they could have been sold. . . . In

⁴⁰ 28 Stat. at L. 963.

⁴¹ 188 U. S. 321.

short, a lottery ticket is a subject of traffic, and is so designated in the Act of 1895."

This point having been disposed of, the court next considered the question whether the exclusion of the tickets from interstate commerce could properly be deemed a "regulation" of that commerce. "Are we prepared," asked the court, to say that a provision which is, in effect, a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States? In determining whether regulation may not under some circumstances properly take the form, or have the effect, of prohibition, the nature of the interstate traffic which it was sought by the Act of May 2, 1895, to suppress, cannot be overlooked."

The court then went on to show that it had come to be generally recognized, as shown by legislation in many of the States, that lotteries are an evil; that they are uneconomic and demoralizing to the people. The court then asked: "If a State when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carriage of lottery tickets from one State to another?" "What clause [of the Constitution]," the court continued, "can be cited which, in any degree countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? . . . Surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals. . . . As a State may, for the purpose of guarding the morals of its own people, forbid the sale of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States may prohibit the carrying of lottery tickets from one State to another. . . . We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end."

After citing instances in which it had previously been held that regula-

tion might take the form, or have the effect, of prohibition of interstate commerce, the opinion concluded: "It may be said, however, that in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce. That principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the constitution. . . . We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that, under its power to regulate commerce among the several States, Congress,—subject to the limitations imposed by the constitution upon the exercise of the powers granted,—had plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State." ⁴²

⁴² Chief Justice Fuller and Justices Brewer, Shiras and Peckham dissented. In the opinion which they filed they said: "Certainly the act before us cannot stand the test of the rule laid down by Mr. Justice Miller in the Trade Mark Cases (100 U. S. 96) when he said: 'When, therefore, Congress undertakes to enact a law, which can only be rated as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If it is not so limited, it is in excess of the power of Congress.' . . . When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so. . . . Is the carriage of lottery tickets from one State to another commercial intercourse? The lottery ticket purports to create contractual relations, and to punish the means of enforcing a contract right. This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies in one State and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. (Citing and quoting from cases) . . . An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This, in effect, knocks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the States all jurisdiction over the subject, so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of State lines, and the creation of a centralized Government."

There can be no question that the decision in the Lottery case gave to the regulatory power of Congress with reference to interstate commerce a broader definition than it had previously received. This it did in two respects: It broadened the meaning which had been laid down in the Insurance cases⁴³ and in the Bills of Exchange case⁴⁴ as to what might be considered articles of commerce; and it declared to be a regulation of interstate commerce, the prohibition of the carrying of an article the transportation of which could not be claimed to interfere in any way with the safety of other commodities carried or with the safety and efficiency with which the general business of interstate transportation is carried on.

However guarded may have been the language of the court as given in the concluding sentences which have been quoted from its opinion, the court must be regarded as having committed itself to the general proposition that the power given to Congress to regulate commerce among the States includes the power to prohibit the carrying or shipping in such commerce of articles with a view not simply of rendering interstate transportation more efficient and safe, or of maintaining proper competitive conditions in interstate trade itself, but of obtaining a social, economic or moral result approved of by Congress as well as by the preponderant opinion of the legislatures of the States, or of the greater number of them, but for the realization of which the States are constitutionally incompetent by reason of their lack of power to control interstate commerce.

It will be observed that this does not commit the Supreme Court to the doctrine that Congress has general authority to secure any social, industrial, economic, or moral ends that it may desire in so far as these ends may be obtained through the exercise of the various powers—including that over interstate commerce—which are granted by the Constitution. The Lottery case is authority only for the doctrine that, where, as a matter of fact, it appears, as it did in the case of lotteries, that the business or transactions, against which the prohibition is directed, is inherently noxious, the use by it of interstate commercial agencies may be denied. In other words, because the business or transaction is noxious, it is one which no one can carry on as a right. Even if, then, it be admitted that, generally speaking, every one has a right to engage in interstate commerce without first obtaining the permission, express or implied, of Congress, and, therefore, that the denial to him of that right is *prima facie* an infringement of his legal rights of liberty and property, it still remains true that, where the business is one which is noxious, or certain of its elements or of the methods of carrying it on are such, the avenues of interstate trade may be closed to it by Congress. In fine, if it is a business which, in its intrastate and domestic aspects, is sub-

⁴³ *Paul v. Virginia* (8 Wall. 168); *Hooper v. California* (155 U. S. 648); *N. Y. Life Ins. Co. v. Cravers* (178 U. S. 389).

⁴⁴ *Nathan v. Louisiana* (8 How. 73).

ject to regulation by the States in the exercise of their so-called police powers, it may similarly be regulated or prohibited by Congress with respect to interstate commerce. But it does not follow from this that Congress has a power of exclusion from interstate commerce which may be arbitrarily exercised without regard to the inherent noxiousness of the commodities or business which is affected.

Whether or not this wider Federal power may be sustained upon grounds other than those contained in the reasoning and decree of the Lottery case will presently be discussed.

§ 583. Pure Food Act.

By the Food and Drugs Act of June 30, 1906, known as the "Pure Food Act,"⁴⁵ Congress has prohibited "the introduction into any State or Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded," and that persons shipping or delivering for shipment, or having received, shall deliver in original unbroken package such adulterated or misbranded foods or drugs, shall be guilty of a misdemeanor and shall be subject to a fine or, for repeated offences, imprisonment. Articles thus illegally shipped are made liable to seizure, and, if condemned, to sale or destruction.

In *Hipolite Egg Co. v. United States*⁴⁶ this statute was held valid as an exercise of the power of Congress to regulate commerce, and was construed to authorize the seizure and confiscation of commodities by a proceeding *in rem* after they had reached their destination but while still in their original unbroken packages. The intent of the law was declared to be "not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce."

In this case the chief question discussed was whether the commodities were subject to seizure not only while in transit but also after they had reached their destination, but still in their original unbroken packages, and whether the prohibition could be applied to goods which had been shipped to the consignee for his own use and not for sale. The court held that the commodities might be thus seized and confiscated by a proceeding *in rem*. Whether or not the commodities thus illegally transported might be pursued beyond the original packages, the court declared it was not called upon to decide.

The constitutionality of the act the court did not discuss beyond saying

⁴⁵ 34 Stat. at L. 768.

⁴⁶ 220 U. S. 45. See also the Federal Caustic Poison Act of March 4, 1927 (44 Stat at L. 1406).

that it rested upon the power of Congress to regulate interstate commerce, and pointing out that the articles concerned were illicit, articles—"articles which the law seeks to keep out of commerce because they are debased by adulteration, and which punishes them (if we may so express ourselves) and the shipper of them." "There is here," the court continued, "no conflict of national and State jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a State. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages."

In *McDermott v. Wisconsin*,⁴⁷ the court gave further consideration to the question as to what application the original Package Doctrine has to articles transported in interstate commerce in violation of the Pure Foods Act, and, with reference to the exclusiveness of the act so as to render inoperative State legislation within the same field, held void an act of the State which provided that the goods should bear a specified label and no other. The constitutionality of the act the court declared to have been already affirmatively determined. As to this the court said: "The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits, the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the Act, and, for the reasons we have stated, we think the requirements of the Act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the Act by the Federal courts" (citing cases in the lower Federal courts).

By act of August 23, 1912,⁴⁸ Section 8 of the act of 1906 was so amended as to make the term "misbranded" apply, in addition to the applications

⁴⁷ 228 U. S. 115.

⁴⁸ 37 Stat. at L. 416.

specified in the original act, to drugs which should contain any false or fraudulent statement, design or device as to their curative or therapeutic value.

In *Seven Cases v. United States*,⁴⁹ in answer to the contention that this caused the act to enter the domain of speculation, and thereby, by virtue of its uncertainty, to operate as a deprivation of property without due process of law, the court said that in order to bring the goods within the operation of the statute, the statements must, as the act declares, be fraudulent as well as false, and that this was a quality susceptible of proof—"persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements. (citing cases) . . . Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods, and in the nature of the case can be deemed to have been made only with fraudulent purpose. The Amendment of 1912 applies to this field and we have no doubt of its validity."⁵⁰

§ 584. Obscene Literature and Articles for Immoral Use.

By act of February 8, 1897,⁵¹ Congress forbade the depositing with any express company or other common carrier for interstate commerce of "any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made."⁵²

The constitutionality of this law has not been squarely passed upon by the Supreme Court, but the law has been upheld in a lower Federal court in *United States v. Popper*,⁵³ and this case was cited with approval by the Supreme Court in *Hoke v. United States*, in which the validity of the so-called Mann Act was sustained.⁵⁴

§ 585. Transportation in Interstate or Foreign Commerce of Women for Immoral Purposes.

By act of March 3, 1875,⁵⁵ the importation into the United States of women for the purpose of prostitution was forbidden and highly penalized.

⁴⁹ 239 U. S. 510.

⁵⁰ For further cases dealing with State police legislation as affected by the Pure Food Law see *Savage v. Jones* (225 U. S. 501); *Weeks v. United States* (245 U. S. 618); *Weigle v. Curtice Bros. Co.* (248 U. S. 285); and *Hebe Co. v. Shaw* (248 U. S. 297).

⁵¹ 29 Stat. at L. 512. See also the Federal Criminal Code, Sec. 245.

⁵² The importation from abroad of the foregoing articles has also been forbidden, as has their deposit for transmission in the mails.

⁵³ 98 Fed. 423.

⁵⁴ 227 U. S. 308.

⁵⁵ 18 Stat. at L. 477.

This provision was superseded by Section 3 of the Immigration Act of March 3, 1903.⁵⁶ This provision was in turn superseded by the act of February 20, 1907,⁵⁷ which broadened the earlier prohibition by adding "or for any other immoral purpose" to the words "for the purpose of prostitution." The law of 1907 also provides punishment for any one who "shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other purpose, any alien woman or girl, within three years after she shall have entered the United States." Deportation of alien women found inmates of such houses or practicing prostitution within three years after having entered the United States is also directed. The constitutionality of these laws, so far as foreign immigration is concerned, is elsewhere discussed.⁵⁸

By act of June 25, 1910,⁵⁹ commonly known as the Mann or White Slave Act, Congress has provided for the punishment of any one who shall knowingly transport or cause to be transported or aid in the transportation in interstate or foreign commerce of any woman or girl for the purpose of prostitution or debauchery or other immoral purpose. The constitutionality of this measure was questioned in the case of *Hoke v. United States*⁶⁰ upon the ground that it is the right and privilege of a person to move from State to State, and that the motive or intention of one so moving, or aiding in inducing such moving, either before, during, or after completing the journey, is not a matter of interstate commerce, and, therefore, not subject to congressional regulation under the Commerce Clause. To this the court replied: "It must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely, if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls. . . .

"Of course it will be said that women are not articles of merchandise, but this does not affect the analogy of the cases; the substance of the congressional power is the same, only the manner of its exercise must be accommodated to the difference in its objects. It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them

⁵⁶ 32 Stat. at L. 1213.

⁵⁷ 34 Stat. at L. 898.

⁵⁸ See § 1101.

⁵⁹ 36 Stat. at L. 825.

⁶⁰ 227 U. S. 308.

to the extent of the act of July 25, 1910, and we need go no farther in the present case.”⁶¹

In *Wilson v. United States*⁶² it was held that transportation by a common carrier is not essential to constitute the offence created by the Mann Act. In this case the indictment, which was sustained, charged that the women involved had crossed State borders on an electric railway line, but did not charge that the defendants had directed or knew how the woman was to cross the State line, that is, whether by a common carrier or in a private vehicle.

In *United States v. Holte*,⁶³ it was held that a woman might conspire to commit an offence against the United States as provided for in Section 37 of the Federal Criminal Code, although the object of the conspiracy was her own transportation in interstate commerce in violation of the provisions of the Mann Act.⁶⁴

In *Caminetti v. United States*,⁶⁵ the court held that the interstate transportation of a woman for an immoral purpose was interstate commerce and was within the purview of the act even though no pecuniary element had been involved. The court conceded that, for the purpose of the argument, Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. “But,” said the court, “this Act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited. The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the Commerce Clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”

§ 586. Game and Animals Killed in Violation of State Law.

By act of May 25, 1900,⁶⁶ known as the Lacey Act, Congress has forbidden the transportation in interstate commerce of “any foreign animals or birds the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the State, Territory or District in which the same are killed.”

⁶¹ For other cases, decided at the same time as *Hoke v. United States*, construing the term “debauchery” and other provisions of the Mann Act, see *Athanasam v. United States* (227 U. S. 326); *Harris v. United States* (227 U. S. 340); and *Bennett v. United States* (227 U. S. 333).

⁶² 232 U. S. 563.

⁶³ 236 U. S. 140.

⁶⁴ Justices Lamar and Day dissented.

⁶⁵ 242 U. S. 470.

⁶⁶ 31 Stat. at L. 188.

The constitutionality of this act has been upheld in the lower Federal courts,⁶⁷ but has not been passed upon by the Supreme Court.

For an account of the Migratory Bird Act passed by Congress in execution of a treaty of the United States, see § 315.

§ 587. Prize-Fight Films.

By act of July 31, 1912,⁶⁸ Congress has made it unlawful "to bring or cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition." It is also made illegal to deposit or cause to be deposited such films or pictorial representations in the United States mails, or with an express company or other common carrier for interstate transportation.

In *Weber v. Freed*,⁶⁹ the portion of this act referring to importation from abroad was sustained with the curt statement that "in view of the complete power of Congress over foreign commerce, and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous."

So far as the author knows, the constitutionality of the interstate commerce provisions of the act have not been questioned or passed upon by the Supreme Court.

§ 588. The Commodities Clause.

The Hepburn Act of 1906 forbids railroads to transport in interstate commerce any commodity, other than timber and its manufactures, which they own in whole or in part, or in which they have an interest direct or indirect, except when such commodities are needed and intended for their own use as common carriers. This provision received its first interpretation from the Supreme Court in a series of cases, decided in 1909.⁷⁰ In these cases it was held that the holding of stock in a coal company by a railroad did not constitute that legal interest in the coal mined by the company which would bring the transportation of the coal within the operation of the Commodities Clause. And, also, that the clause would not apply if the railroad had owned the mine and mined the coal, but had sold the coal at the mouth of the pit.

In these cases the lower court had considered and held against the constitutionality of the Clause, and the Supreme Court also felt it necessary

⁶⁷ *Rupert v. United States* (181 Fed. 87).

⁶⁸ 37 Stat. at L. 240.

⁶⁹ 239 U. S. 325.

⁷⁰ *Sub nom. United States ex rel. Atty. Gen. v. Delaware and Hudson Co.* (213 U. S. 366).

to consider this point. Justice White, who rendered the opinion of the court, said:⁷¹ "If the contention of the Government as to the meaning of the Commodity Clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of any inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced, or owned them, etc.? And, involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities,—a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the government of the United States, both within its spheres of national and local legislative power, has, in the past, for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?"

It will be seen that the court held that the foregoing grave constitutional questions would have to be decided should the contentions of the United States Government in the instant case as to the meaning of the Commodities Clause be held well founded. In fact, however, the court held that the clause did not, and had not by Congress been intended to, apply to a case, like the instant one, in which the carrier had dissociated itself from the ownership of a commodity prior to its transportation. The court further held that the ownership by a carrier of stock in a *bona fide* corporation manufacturing, mining or producing or owning the commodity carried did not constitute that ownership or interest, direct or indirect, in the commodity which is referred to in the Commodity Clause.

As applied to commodities in which, at the time of transportation, the

⁷¹ From which only Justice Harlan dissented.

carrier has ownership, or a real interest, direct or indirect, the clause was declared constitutional, the court saying that it did not rest this holding upon the hypothesis that the power of Congress "embraces the right to absolutely prohibit the movement between the States of lawful commodities, or to destroy the governmental power of the States as to subjects within their jurisdiction, however remotely or indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting those considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated."

The chief authority relied upon by the court in this holding was the case of *N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission*.⁷² In that case the court had held that the prohibitions of the Interstate Commerce Act as to uniform rates and rebates operated to prevent a carrier from itself buying and selling a commodity transported by itself in such a way as to defeat the purposes of these prohibitions.

The holding of the court in the case of *United States v. D. & H. Co.* that the ownership by the carrier of stock in the corporation which manufactured, mined or owned the commodity carried did not constitute an ownership or interest in the commodity which would bring it within the operation of the Commodities Clause was generally considered to have greatly weakened that Clause. In later cases, however, the court showed a willingness to give a more liberal interpretation to the Clause.

In *United States v. Lehigh Valley R. Co.*⁷³ the court held that, while the mere holding by a carrier of stock in a corporation which manufactured, mined or owned a commodity transported did not constitute an interest, direct or indirect, which would bring the transaction within the scope of the Commodities Clause, yet the carrier might so exert its power as a stockholder as to deprive the corporation of a real independent existence and thus make it but an agency of the carrier, and that, when this was done, the prohibition of the Clause would apply.

In *Delaware, L. & W. R. Co. v. United States*⁷⁴ it was held that the Commodities Clause did not deny due process to the carrier, the court saying: "The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished, or the quality of the service rendered. The commodity clause

⁷² 200 U. S. 301.

⁷³ 220 U. S. 257.

⁷⁴ 231 U. S. 363.

was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper."

In *United States v. Delaware, L. & W. R. Co.*⁷⁵ it was held that the prohibition of the Clause was violated when a railway company owning coal mines entered into a contract with a coal company, having practically identical stock ownership with itself, according to which the railway company sold its coal at the mouths of the mines to the coal company, but instantly regained possession of the coal as a carrier, and retained such possession until the delivery of the coal to the coal company at the point in another State to which it was transported. After calling attention to other special and restrictive features of the contract between the railway and the coal company which were in restraint of trade, the court said: "The railroad company, if it continues in the business of mining, must absolutely dissociate itself from the coal before the transportation begins. It cannot retain the title nor can it sell through an agent. It cannot call that agent a buyer while so hampering and restricting such alleged buyer as to make him a puppet, subject to the control of the railroad company. . . . It must leave the buyer as free as any other buyer who pays for what he has bought."

Again, in *United States v. Reading Co.*⁷⁶ it was held that the prohibition of the Clause had been violated when a railway company and a coal company had each placed their entire stock in the hands of a holding corporation, and when the three companies had the same officers and directors, and the companies were in fact operated as one organization.

§ 589. Convict-Made Goods.

There has been considerable agitation for a Federal law excluding from interstate commerce goods manufactured by convicts. As yet, however, no such legislation has been secured. However, by the act of March 21, 1922,⁷⁷ the importation of such goods from foreign countries has been prohibited.

§ 590. Child Labor and Interstate and Foreign Commerce.

By act of September 1, 1916,⁷⁸ Congress provided:

"That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such produce there-

⁷⁵ 238 U. S. 516.

⁷⁶ 253 U. S. 24.

⁷⁷ 42 Stat. at L. 937.

⁷⁸ 39 Stat. at L. 675.

from children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the age of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian."

This provision was held unconstitutional as to interstate commerce in the case of *Hammer v. Dagenhart*,⁷⁹ as not being a regulation of interstate commerce, and, therefore, as not warranted by the Commerce Clause, but, upon the contrary, as being a regulation of production or manufacture which it is within the exclusive power of the States to regulate. The court, after referring to the other instances in which the power of Congress to exclude commodities from interstate commerce had been upheld, pointed out that in each of those instances the use of interstate transportation had been necessary to the accomplishment of harmful results. "In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended."

This element, the court found absent in the instant case. "The Act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. . . . When offered for shipment and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power."

To the contention that the shipment of goods produced by child labor into other States prevented those States from prohibiting child labor in their mines or factories, because if they did so the costs of production would be too high as compared with the costs of production in the States permitting child labor, the court said: "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Busi-

⁷⁹ 247 U. S. 251. Four justices dissented.

ness done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."

It follows *a fortiori* from the holding of the court in *Hammer v. Dagenhart* that Congress has no power to exclude commodities from interstate commerce irrespective of their intrinsic character or the conditions of their production or consumption. This arbitrary power the court cannot sustain until it is ready to accept the proposition that the right to engage in interstate commerce is not merely one protected by the Constitution against State control or restraint, but one which owes its very existence to Federal law, or, what amounts to the same thing, that the interstate carrier systems, whether directly operated by the Federal Government, or delegated to private hands for operation, are distinctly Federal agencies in the same sense that the postal system and National Banks are.⁸⁰

§ 591. Stolen Automobiles excluded from Interstate Commerce.

By act of October 17, 1919,⁸¹ known as the "National Motor Vehicle Theft Act" or "Dyer Act," Congress prohibited and penalized the transporting or causing to be transported in foreign or interstate commerce of vehicles known to have been stolen, and also the receiving, storing, bartering, selling or disposing of any motor vehicle moving as, or which is a part of, or which constitutes interstate or foreign commerce, and known to have been stolen.

In *Brooks v. United States*,⁸² the constitutionality of this act was upheld upon the authority of the cases upholding the exclusion of lottery tickets, misbranded and adulterated foods, intoxicating liquors, etc. "Congress can certainly regulate interstate commerce," said the court, "to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field

⁸⁰ See, for example, *Ex parte Jackson* (96 U. S. 727); and *Ex parte Rapier* (143 U. S. 110).

In *Davis v. Elmira Savings Bank* (161 U. S. 275) the National Banks are described as "instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."

⁸¹ 41 Stat. at L. 324.

⁸² 267 U. S. 432.

of interstate commerce." The case was distinguished from *Hammer v. Dagenhart*,⁸³ in which the Federal Child Labor Law had been held invalid, by pointing out that the articles made by child labor were harmless and could be properly transported without injuring any person who either bought or used them. As to the reasonable police basis for the National Motor Vehicle Theft Act, the court said: "It is known of all men that the radical change in transportation of persons and goods effected by the introduction of the automobile, the speed with which it moves, and the ease with which evil-minded persons can avoid capture have greatly encouraged and increased crimes. One of the crimes which have been encouraged is the theft of the automobiles themselves and their immediate transportation to places remote from homes of the owners. Elaborately organized conspiracies for the theft of automobiles and the spiriting them away into some other State and their sale or other disposition far away from the owner and his neighborhood have roused Congress to devise some method for defeating the success of these widely spread schemes of larceny. The quick passage of the machines into another State helps to conceal the trail of the thieves, gets the stolen property into another police jurisdiction and facilitates the finding of a safer place in which to dispose of the booty at a good price. This is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by any one with knowledge of the theft because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions."

§ 592. Summary and Conclusion Regarding Federal Power to Exclude from Interstate Commerce.

It has been seen that the Supreme Court, in a very considerable number of instances, and with reference to a variety of commodities and classes of persons, has recognized the right of Congress to exclude from, and to penalize the transportation, or procuring the transportation, of persons or commodities in interstate commerce. Not yet, however, has the court recognized that this right of exclusion is a plenary one which may be exercised whenever Congress may see fit. The decision in the Child Labor case⁸⁴ makes this plain. It may, then, be asked: Just how far has the Supreme Court gone along the path which leads to a wholly arbitrary right of exclusion upon the part of Congress, and just what barriers prevent the reaching of that terminus?

It is clear that, in a broad or general sense, the exclusion of any commodity or class of persons from interstate commerce, whatever be the grounds or criteria upon which that exclusion is rested, is a regulation of that commerce in the sense that it affects the carrying on of that commerce.

⁸³ 247 U. S. 251.

⁸⁴ *Hammer v. Dagenhart* (247 U. S. 251).

It is conceivable, therefore, that the court might have taken this position and declared that the propriety of the exclusion is a matter wholly within the discretion of Congress⁸⁵ or, the court might have declared that the right of the individual or corporation to engage in interstate commerce is one that is a distinctively Federal right, the creation of Federal law, and, therefore, that no one has the right to engage in it, or to enjoy its benefits or facilities, except with the consent of Congress,—a consent that may be qualified in any way and accorded upon any terms and with any limitations that Congress may see fit to impose. In other words, the court might have given to interstate commerce the same character as the carrying of the mails.

Had the Supreme Court declared either of the foregoing doctrines, the regulatory power of Congress over interstate commerce would have had no limits save those imposed by the requirements of due process of law.⁸⁶ In fact, however, the Supreme Court has not as yet accepted either of these doctrines, although, so far as the author knows, it has never explicitly declared the unsoundness of the second one.

With regard, then, to the power of Congress to exclude from interstate commerce the court has gone this far:

1. It has held that any article the transportation of which may endanger the actual carrying on of interstate commerce, or which will or may contaminate other goods which are being transported, may be excluded.⁸⁷

2. It has been held that, if there is a real and substantial relation between the rule and the carrying on of commerce, the regulation will be valid even though the ultimate effect of the law be to regulate a matter other than commerce, and even though this ultimate effect be really the end sought by Congress. Thus, in *McCray v. United States*⁸⁸ the court declined to look beyond the nature of a law as disclosed upon its face, and test its constitutionality by its ultimate and intended effect. The consequences that might arise from its enforcement, the court held, could not operate to invalidate a law otherwise valid. The law in question being clearly an excise measure, was upheld as such. Thus, also, it has been generally conceded that the constitutionality of a tariff act may not be questioned upon the ground that the incidental effect of its enforcement will be to

⁸⁵ This, in substance, was the position which the four dissenting justices in *Hammer v. Dagenhart* thought the court should take. They said: "Under the Constitution such (interstate) commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States."

⁸⁶ As to this see *post*, Chapter CI.

⁸⁷ In *Champion v. Ames* (188 U. S. 321) the court spoke of lottery tickets as "polluting" commerce, but this could of course be true only in a figurative sense, and could not be used as a valid argument for bringing the exclusion of such tickets within the class of measures adopted as means of securing or promoting the safety or efficiency of transportation.

⁸⁸ 195 U. S. 27.

protect certain domestic industries, and that this protection has been, indeed, the real result desired by Congress.

3. It has been held that persons or commodities may be excluded from interstate commerce, or the facilities of interstate transportation otherwise refused when such transportation is a step in bringing about a result of which Congress disapproves, and which, but for the facilities offered by interstate commerce, could not be achieved; in other words, that this disapproved result will occur in the States to which the articles or persons are transported, and has not already been brought about in the States of origin.

4. Congress may exercise a right of exclusion from interstate commerce when this is a necessary or reasonable means of rendering effective a policy which, in itself, is one which Congress has the constitutional right to enforce. This type of exclusion is represented in the Commodities Clause of the Hepburn Act of 1906, and also by the provision of the act of February 19, 1903,⁸⁹ which, in *N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission*,⁹⁰ was construed to prevent a carrier from becoming the purchaser and seller of the commodities transported by it. To permit this, the court declared, would enable a carrier to select the favored persons from whom it would purchase or to whom it would sell, thus opening the direct way not only to that discrimination, but to that possible monopoly in interstate commerce which Congress, with constitutional right, has forbidden.

5. The facilities of interstate commerce may not be refused by Congress to commodities not dangerous to transport and of such a character that their use or consumption will do no injury, moral or physical, to any one, simply upon the ground that they have been produced or manufactured in ways or under conditions objectionable to Congress.⁹¹

§ 592a. Doctrine of Child Labor Case Examined.

As to whether or not the Supreme Court was compelled by the logic of earlier cases to take this fifth position, which it did in *Hammer v. Dagen-*

⁸⁹ 32 Stat. at L. 847.

⁹⁰ 200 U. S. 361.

⁹¹ In the Child Labor case it held that the Federal act was void upon the double ground that it was not a "regulation" of Congress, since it was concerned neither with the safety and efficiency of the carrying on of that commerce nor with the prevention of an undesirable result following transportation, and because the act was, in essence, a regulation of production or manufacture,—a matter within the exclusive jurisdiction of the States. This second contention of the court seems a difficult one to agree with for, whatever may have been the motive of Congress in enacting the law—a matter beyond the cognizance of the court—it is certain that the law, upon its face, imposed no obligations upon the manufacturer or mine operator, and left the States free to regulate mining and manufacturing as they might see fit. In other words, the Federal law did not begin to operate until the products of the factory or mine were placed in interstate commerce.

hart,⁹² has been much disputed by commentators as well as by the four justices who dissented in that case. The point is of sufficient importance to justify a consideration of it even though, until, if ever, the Child Labor case is overruled, it may be said to be of only academic interest. This discussion can most profitably take the form of an examination of the argument of the dissenting justices.

Justice Holmes who read the dissenting opinion in the Child Labor case,—a dissenting opinion concurred in by Justices McKenna, Brandeis and Clarke—relied upon *Champion v. Ames*,⁹³ *McCray v. United States*,⁹⁴ *Veazie Bank v. Fenno*,⁹⁵ *Hipolite Egg Co. v. United States*,⁹⁶ *Hoke v. United States*,⁹⁷ *Caminetti v. United States*,⁹⁸ *Clark Distilling Co. v. Western Maryland R. Co.*,⁹⁹ and other cases as establishing the doctrine that Congress, in the exercise of an acknowledged power may reach indirectly a result which it is not constitutionally authorized to reach directly,—that the desire to reach this indirect result which may have furnished to Congress the real motive for its action is not a matter which the court can constitutionally inquire into. "I had thought," said Justice Holmes, "that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.

"The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with

⁹² 247 U. S. 251.

⁹³ 188 U. S. 321.

⁹⁴ 195 U. S. 27.

⁹⁵ 8 Wall. 533.

⁹⁶ 222 U. S. 45.

⁹⁷ 227 U. S. 308.

⁹⁸ 242 U. S. 470.

⁹⁹ 242 U. S. 311.

quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."

That there is great force in this reasoning of Justice Holmes and of the other justices concurring with him must be admitted, for the difference between the prevention of evils occurring prior to interstate transportation and those occurring or likely to occur after such transportation is not a substantial one. Furthermore, starting from the proposition of the majority of the court that the power of Congress to regulate interstate commerce may constitutionally take the form of denial of the facilities of such commerce to those persons who would use them for the carrying on of a business or the carrying out of an enterprise which, as a matter of police regulation, may properly be regulated or prohibited, the court might well have argued that, in fact, by giving the facilities of interstate commerce to the companies or persons employing child labor, aid is given to the successful carrying out of a business which is opposed to public policy; in other words, that the business should, for the purpose of the point under consideration, be considered as a whole of which the use and consumption of the commodities mined or manufactured is as much an integral part as is their production, and that by affording to the business the facilities of interstate commerce the element of consumption is, as it were, linked up with the productive element, so far as sales outside the State of production is concerned, and thus the whole business or enterprise made, to that extent, economically and financially possible. In fine, that, by permitting interstate transportation in goods produced in mines or manufacturing establishments employing children under the ages specified in the act, substantial and direct aid is given, or at any rate is not denied, by the Federal Government to such mining or industrial concerns.

By some critics of the holding of the court in the Child Labor case it has been argued that, in fact, in prior instances, exclusion from interstate transportation had been upheld when the only grounds for exclusion had been the conditions under which the excluded commodities had been produced. Two such instances, thus alleged, are the exclusion of commodities (other than timber and products manufactured therefrom) owned, directly or indirectly, by the carriers transporting them, as provided for in the Commodity Clause of the Hepburn Act of 1906, and Section 6 of the Sherman Anti-Trust Act of 1890, which provides for the seizure and confiscation of property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof) forbidden by the act, and in course of transportation from one State to another or to a foreign country. It is the author's opinion, however, that neither of those two statutory provisions exemplifies the point in support of which they are

adduced. The prohibition contained in the Commodity Clause was a necessary and proper means for making effective that policy of preventing discriminations in interstate commerce which, without dispute, Congress is constitutionally empowered to enforce, and it is established that, as ancillary or auxiliary to the enforcement of a constitutional policy, Congress may impose regulations which, except as being of an ancillary or auxiliary character, it could not impose. Thus, to give but a single example, Congress, as a means of effectively enforcing its excise tax upon cigars, cigarettes and smoking or chewing tobacco may require that these kinds of tobacco be packed and sold in specified quantities and packages.

Regarding Section 6 of the Anti-Trust Act of 1890 it is sufficient to point out that this is a penalty rather than an exclusion provision, and has for its purpose the enforcement of the other provisions of the act regarding contracts, combinations, or conspiracies in restraint of trade or commerce among the several States or with foreign nations, the constitutionality of which is established.

It has been argued that, even if it has not the power over individuals, Congress has an absolute and arbitrary power to exclude State corporations from engaging in interstate or foreign commerce for the reason that these fictitious creatures, having no right to existence beyond the boundaries of the States creating them, have no rights outside such boundaries which the United States is bound to respect. It would seem, however, that this position is not well taken. Even though these corporate bodies are not considered as citizens within the meaning of certain of the clauses of the Constitution, it is established that they are persons within the meaning of the Fourteenth and Fifth Amendments which protects them against deprivation of life, liberty or property without due process of law:¹⁰⁰ and, this being so, it is clear that they have an equal right with individuals to engage in interstate and foreign commerce. Indeed, the same reasoning which supports the line of cases holding that the States may not prevent foreign corporations from entering their borders for the purpose of engaging in interstate and foreign commerce, supports the doctrine that, so far as Federal regulation is concerned, they are entitled to the same rights as are natural persons.

¹⁰⁰ *Gulf, etc., Ry. Co. v. Ellis* (165 U. S. 150).

CHAPTER LIII

THE STATES AND INTERSTATE COMMERCE: GENERAL

Thus far in the discussion of the constitutional principles governing the regulation of interstate commerce, the conflicts which have arisen in relation thereto between the National Government and the States have been only incidentally dealt with. In the present and immediately succeeding chapters these conflicts will be directly and specifically considered. But first must be considered certain more general principles governing the competence of the States with reference to interstate commerce.

§ 593. Common-Law Obligations of Interstate Carriers.

In the absence of congressional regulation the common law of the States controls with reference to the so-called common-law rights, duties, and responsibilities of public carriers, interstate as well as intrastate. These rights and duties which relate to reasonableness of service, impartiality of treatment of shippers, liabilities either contractual or in tort for injuries to passengers or freights, etc., have in many instances, it is apparent, more than a local significance and effect, and it is, therefore, somewhat difficult to justify, upon principle, the constitutional authority of the States in these respects. Practical necessity and convenience seem, however, to have demanded that this validity should be ascribed to the common law of the States, for otherwise, in the absence of congressional regulation, there would be no law whatever for the courts to apply.¹ In *Murray v. Chicago & N. W. Ry. Co.*² the argument *ab inconvenienti* was adopted as controlling.

The doctrine that, in the absence of congressional action, these common-law principles should apply even with reference to interstate commerce carriers was declared in a number of cases, and without serious dissent;³ but in *Western Union Tel. Co. v. Call Pub. Co.*⁴ the point was pressed that the giving to State law an operation over interstate commerce with reference to matters not purely local was unconstitutional. The court, however, reaffirmed the doctrine, and said:

¹ That there is no Federal common law which, in absence of congressional statute, can be made use of is fairly certain. Cf. *United States v. Worrall* (2 Dall. 384); *Wheaton v. Peters* (8 Pet. 591). But see *Western Union Tel. Co. v. Call Pub. Co.* (181 U. S. 92).

² 62 Fed. Rep. 24.

³ *Interstate Commerce Com. v. B. & O. R. R. Co.* (145 U. S. 263); *Bank of Kentucky v. Adams Express Co.* (93 U. S. 174); *Murray v. C. & N. W. R. R. Co.* (62 Fed. Rep. 24).

⁴ 181 U. S. 92.

"The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not, at the time the services were rendered, prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that, therefore, there being no controlling statute or common law, the court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the Journal Company. . . . The logical result of this contention is that persons dealing with common carriers engaged in interstate commerce and in respect to such commerce are absolutely at the mercy of the carriers. It is true, counsel do not insist that the telegraph company or any other company engaged in interstate commerce may charge or contract for unreasonable rates, but they do not say that they may not; and if there be neither statute nor common law controlling the action of interstate carriers, there is nothing to limit their obligation in respect to the matter of reasonableness. We should be very loth to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services; and, if there be no law to restrain, the necessary result is that there is no limit to the charges they may make and enforce. . . . Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. . . . To affirm that a condition of things exists under which common carriers anywhere in the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.⁵

In *B. & O. R. Co. v. Baugh*,⁶ with reference to the matter of the fellow-servant doctrine, the court held that it was one of general common law,

⁵ See also *Sherlock v. Alling* (3 Otto, 99); *Missouri R. R. Co. v. Larabee Flour Co.* (211 U. S. 612); *McNeill v. Southern R. R. Co.* (202 U. S. 543); *Chicago R. R. Co. v. Solan* (169 U. S. 133); *Lake Shore R. R. Co. v. Ohio* (173 U. S. 285). Cf. *Columbia Law Review*, IX, 375, article by E. Parmelee Prentice, "Federal Common Law and Interstate Commerce."

⁶ 149 U. S. 368.

rather than of the specific common law of the several States, and, therefore, in determining and applying it, the court would not be controlled by the decisions of the State courts, but would exercise its own independent judgment, that is, that it would regard the question as "one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant."

§ 594. Local Regulations Affecting Interstate Commerce.

The rule stated as to the distinction between subjects requiring general and those necessitating, or at least rendering highly desirable, local regulation, is a simple and rational one. It is, however, one which, in application, has not infrequently given rise to considerable difficulty, there being no definite *criteria* for distinguishing between these two classes of subjects. This has made it necessary that each case should be determined by itself, with the result that the Supreme Court in each instance has decided whether the State law in question was, or was not, regulative of a matter properly requiring national control.⁷

Among the more important subjects which, it has been held, may, in the absence of Federal legislation, be controlled by the States, because they lend themselves to local regulation, are ferries, bridges, pilotage, and harbor regulations, or, in general, the protection and improvement of navigable waters.

The general rule governing all the cases is, perhaps, best stated and the authorities summarized, in *Covington, etc., Bridge Co. v. Kentucky*.⁸

⁷ Thayer in a note in his *Cases on Constitutional Law*, p. 2190, points out that this question as to the need for local or national regulation is, inherently, a legislative and not a judicial one.

⁸ 154 U. S. 204. "The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all. The first class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots (*Cooley v. Philadelphia Port Wardens*, 12 How. 299; *Pacific Mail SS. Co. v. Joliffe*, 2 Wall. 450; *Ex parte McNeil*, 13 Wall. 236; *Wilson v. McNamee*, 102 U. S. 572); quarantine and inspection laws and the policing of harbors (*Gibbons v. Ogden*, 9 Wheat. 1; *New York v. Miln*, 11 Pet. 102; *Turner v. Maryland*, 107 U. S. 38; *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health*, 118 U. S. 455); the improvement of navigable channels (*Mobile Co. v. Kimball*, 102 U. S. 691; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678; *Huse v. Glover*, 119 U. S. 543); the regulation of wharves, piers and docks (*Cannon v. New Orleans*, 20 Wall. 577; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80; *Northwestern U. Packet Co. v. St. Louis*, 100 U. S. 423; *Cincinnati, P. B. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R.*

§ 595. Ferries.

That the transportation of persons and property by ferries across rivers or other bodies of water from one State to another State is interstate commerce and subject as such to the regulating power of Congress was declared in *Gloucester Ferry Co. v. Pennsylvania*; ⁹ but that the States, in the absence of Federal regulations, might exercise a measure of control over such ferries, was conceded.

In *Covington & C. Bridge Co. v. Kentucky* ¹⁰ the question was as to the power of the State of Kentucky to regulate tolls upon an interstate bridge built pursuant to the concurrent action of Kentucky and Ohio. The power was denied as being a regulation of interstate commerce. In that case it was said that because a State may authorize a ferry or bridge from its own territory to that of another State, it does not follow that it may regulate the charges upon such a bridge or ferry;—that, to concede such a right would permit the State of Kentucky “to reach out and secure for itself a right to prescribe a rate of tolls applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky,” and thus practically to nullify a corresponding right upon the part of Ohio to fix tolls from her own shores.

In *Port Richmond & B. F. Co. v. Board of Freeholders*, ¹¹ the court seized upon this portion of the court’s opinion and declared it to be the “adequate basis” for the judgment in the *Covington* case, and in the instant case, held that, Congress not having acted, with regard to ferries not operated in connection with interstate railways or as parts of a longer and continuous transportation, but simply “as means of transit from shore to shore,” the States might fix reasonable rates for the services rendered. As to these ferries, detached from longer interstate routes, the court said: “These have always been regarded as instruments of local convenience,

Transp. Co. v. Parkersburg, 107 U. S. 691; *Ouachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444; the construction of dams and bridges across navigable waters of a State (*Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245; *Cardwell v. American River Bridge Co.*, 113 U. S. 205; *Pound v. Turck*, 95 U. S. 459); and the establishment of ferries (*Conway v. Taylor*, 1 Black, 603). But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class—of those laws wherein the jurisdiction of Congress is exclusive. (*Brown v. Houston*, 114 U. S. 622; *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465.)”

See also the opinion of the court in the *Minnesota Rate* cases, *Simpson v. Shepard* (230 U. S. 352), for an extended enumeration of the cases in which, in the absence of Federal legislation covering the same ground, State regulations, though affecting interstate commerce, have been upheld.

⁹ 114 U. S. 196. This case was with regard to the validity of a State law tax upon properties of a ferry company.

¹⁰ 154 U. S. 204.

¹¹ 234 U. S. 317. See also *Vidalia v. McNeely* (274 U. S. 676).

which, for the proper protection of the public, are subject to local regulation; and where the ferry is conducted over a boundary stream, each jurisdiction with respect to the ferriage from its shore has exercised this protective power. . . . We put on one side the question of discriminatory requirements, or burdensome exactions imposed by the State, which may be said to interfere with the guaranteed freedom of interstate commerce, or with constitutional rights of property. The present question is simply one of reasonable charges."

In *Sault Ste. Marie v. International Transit Co.*¹² the court held that a State might not require a Canadian corporation operating a ferry between the State and Canada to take out a license and pay a license tax as a condition precedent to being permitted to receive and land persons and property at its wharf in the State. So to do, it was declared, would be an unconstitutional interference with the carrying on of foreign commerce, irrespective of whether it might be in violation of treaty rights of Great Britain.

§ 596. Transportation with Both Terminals within a State, but partly outside the State.

It is well established that commerce carried on between two points within a State, but involving transportation for a part of the way outside the State, is interstate commerce, and, therefore, subject to corresponding Federal control, and removal from State control.

Thus it is established that a State may not, without violating the Commerce Clause, fix and enforce rates for the continuous transportation of goods between two points within the State, when a part of the route is, however, outside the State. The doctrine though not at first very positively stated may be considered as having been firmly adopted by *Hanley v. Kansas City Southern R. Co.*¹³

It would seem that the doctrine as to the taxation of receipts for transportation over routes running outside the State but between points within the State is not to be so strictly construed against the States as is that of the regulation of the rates. This is on the theory that the transportation over such routes is a unit and must be charged for as such, whereas a tax on the railway company based on the amount of transportation over its roads within the State is a reasonable one. Such a tax as this was upheld in *Lehigh Valley R. Co. v. Pennsylvania*¹⁴ and, it is to be admitted, that the language employed by the court seemed to indicate that commerce carried on between two points within the same State is to be considered in all cases domestic even when part of the route lies outside the State.¹⁵ But

¹² 234 U. S. 333.

¹³ 187 U. S. 617. See also *U. S. v. D., L. & W. R. Co.* (C. C.) (152 Fed. Rep. 269).

¹⁴ 145 U. S. 192.

¹⁵ The court said: The question "is simply whether, in the carriage of freight and passengers between the points in one State, the mere passage over the soil of another

when the attempt was made to apply the same doctrine to the State regulation of rates, the court, in *Hanley v. Kansas City Southern R. Co.* speaking of the decisions of State courts which had applied the doctrine of the *Lehigh* case to rate regulation said: "We are of opinion that they carry their conclusion too far. That [the *Lehigh* case] was the case of a tax, and was distinguished expressly from an attempt of a State directly to regulate the transportation while outside its borders."¹⁶

In *Ewing v. Leavenworth*¹⁷ this distinction was again relied upon.

In *Missouri Pac. R. Co. v. Stroud*¹⁸ it was held that a State law was inapplicable where the usual route of transportation to the intended destination was partly outside the State and the shipper had not designated a wholly intrastate route.¹⁹

In *Western Union Telegraph Co. v. Speight*²⁰ it was held that the transmission of a telegram between two points in the same State was interstate in character, so as to prevent the application to it of a State law, when, *en route*, it passed outside the State, even though it would have been physically possible to send the message over wires not passing outside the State, though such a route would have been the most convenient, economic and quickest one. It was contended in this case that the route running outside the State had been selected by the telegraph company for the purpose of avoiding the requirements of the State law. As to this the court said: "The motive would not have made the business intrastate. If the mode of transmission adopted had been unreasonable as against the plaintiff, a different question would arise; but in that case the liability, if it existed, would not be a liability for an intrastate transaction which never took place, but for an unwarranted conduct and the resulting loss."

§ 597. Continuity of Transportation.

In *Chicago, M. & St. P. R. Co. v. Iowa*²¹ it was held that the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement and thus prevent the reshipment to a point within the State from having an independent and intrastate character, and as such being subject to State control.

State renders that business foreign, which is domestic. We do not think that such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

¹⁶ See *post*, Chapter LVIII.

¹⁷ 226 U. S. 464.

¹⁸ 267 U. S. 404.

¹⁹ Citing *Northern Pac. Ry. Co. v. Solum* (247 U. S. 477).

²⁰ 254 U. S. 7.

²¹ 233 U. S. 334.

CHAPTER LIV

THE STATES AND INTERSTATE COMMERCE: POLICE REGULATIONS

§ 598. The Police Powers of the States and Commerce.

Very closely related to the authority of the States to legislate with reference to commercial matters of a local character,¹ is the power of the States, in the exercise of their police powers, to enact and enforce measures which incidentally, but often substantially, affect interstate commerce.

The distinction that is drawn between these police powers of the States, and their authority to enforce local commercial regulations is that, in the absence of countervailing Federal legislation, the latter are valid even though conceded to bear directly upon interstate or foreign commerce; whereas the police regulations are only valid when their influence upon interstate or foreign commerce is but an incidental or indirect one. In other words, as to matters of local concern, the States are recognized to have a concurrent legislative power in the fields of interstate and foreign commerce; while, as to police measures (and the same is especially true as to tax laws or other State laws for the regulation of domestic commerce) the States have an authority which is not concurrent with that of the United States. Thus, local regulations even though they operate directly upon interstate and foreign commerce are valid unless and until there is Federal legislation concerning the same subject. Tax laws, laws for the regulation of domestic commerce and police regulations, upon the other hand, have no constitutional validity whatever if they operate directly and primarily as a restraint upon interstate or foreign commerce as such.

To the writer it would seem that the foregoing distinction between the concurrent local legislative powers and the police powers of the States with reference to interstate and foreign commerce is an unnecessary and confusing one, for the fact is to be noted that all of the local regulations which have been referred to in the preceding section may properly be described as police regulations and justified as such. If, and when, so justified, it will be possible for the courts, without changing substantially the effect of its holdings, to accept finally and completely the doctrine of the exclusiveness of the Federal authority over interstate and foreign commerce, and base the validity of local State commercial regulations not upon a State concurrent legislative power to regulate interstate commerce as to local matters which are not susceptible of, or which do not demand national regulation as to local matters, but upon the States' police or other

¹ See § 594.

reserved powers.² However, the courts still recognize the distinction between the two sources of State power to affect interstate commerce by their legislation, and this practice is, therefore, here followed.

That a State law which, in its essential nature, is a legitimate exercise of the police power is not rendered invalid by reason of the fact that interstate commerce is thereby incidentally affected is well established.

In *Western Union Telegraph Co. v. Brown* ³ it was held that, because the matter was one of interstate commerce, a State could not penalize the negligent delay by a telegraph company in delivering a telegram sent from a point within a State to a point without the State.⁴

However, in *Hennington v. Georgia*,⁵ in which case was upheld a State statute prohibiting the running of freight trains on Sundays, the court, after a review of adjudged cases, said: "These authorities make it clear that the legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent or for a limited time the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce, and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved, and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." ⁶

² See Cooke, *Commerce Clause*, § 55.

³ 236 U. S. 542.

⁴ Citing *W. U. Tel. Co. v. Pendleton* (122 U. S. 347) and *W. U. Tel. Co. v. Commercial Mill Co.* (218 U. S. 416).

⁵ 163 U. S. 299.

⁶ This equality of treatment of interstate and domestic commerce is not, it is to be observed, an infallible test as to the validity of State law affecting interstate commerce. Thus in *Robbins v. Taxing District of Shelby Co.* (120 U. S. 489) the court was obliged to abandon this rule. The court there said: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States—that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though

However, it is probably correct to say that equality of treatment, as between interstate and intrastate commerce, though not conclusive of the fact that interstate commerce is not unconstitutionally interfered with, nevertheless may support a presumption that the State is exercising in good faith its police powers.

Interference with interstate and foreign commerce, it is to be emphasized, is permitted only when the necessities and the convenience of the public seem to demand it, and when the regulation provided for is a reasonable and just one. In other words, the States may not, under the guise of an exercise of their police powers, attempt what in effect amounts to a direct regulation of interstate and foreign commerce, or impose an unnecessary or arbitrary burden upon interstate carriers. As will later appear the same principle applies to the exercise of the other powers of the States, as for example, the power to tax, or to regulate domestic commerce. In the exercise of these powers it is often the case that interstate and foreign commerce are indirectly and even substantially affected. But in no case can regulation of interstate and foreign commerce be the direct or primary aim of the State's action. If this is the aim or effect, no support for the validity of the law may be obtained by calling the law a police regulation. "The substantial question in any given case is," said the court in *Henderson v. Mayor*,⁷ "whether or not there is a valid exercise of a power reserved to the States, whether or not within the scope of the 'police power.' It has been well said as to the police power, that 'no definition of it and no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution. Nothing is gained in the argument by calling it the police power.'"⁸

An interesting case in which it is shown that the court will not permit interstate carriers to be subjected to unnecessary or unreasonable police regulations is *Houston, etc., R. R. Co. v. Mayes*.⁹ In this case it was held that a State law which penalized the failure of a railway company to furnish shippers with cars within a certain number of days after notice, and permitted no excuse except inability arising from strikes or other public calamity, was unconstitutional in so far as it applied to interstate carriers. The court said: "Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax cases* (15 Wall. 232)."

⁷ 92 U. S. 259.

⁸ *Cf. L. S. & M. S. Ry. Co. v. Ohio*, 173 U. S. 285.

⁹ 201 U. S. 321.

It is thus evident that the Federal court will examine a State police regulation not only with reference to the fact whether or not it amounts to a direct regulation of interstate commerce, but whether its provisions are in themselves sufficiently reasonable, practicable, and just, as to furnish an excuse and justification for the incidental interference with interstate commerce which their enforcement will necessitate.

Finally, with reference to the police powers of the States and interstate commerce, it is to be observed that however incidental their effect upon such commerce may be they have no validity in so far as they conflict with existing Federal statutes. In *Houston v. Mayes*¹⁰ the court said: "Of course such [police] rules are inoperative if conflicting with regulations upon the same subject enacted by Congress."

§ 599. Applications of the Doctrine of the Police Powers of the State in Their Relation to Interstate Commerce.

The general principles governing the exercise of police powers by the States in their relation to interstate commerce have been stated. It remains but to enumerate certain of the applications which, in specific instances, these doctrines have received.

§ 600. State Regulation of Interstate Trains.

A series of cases has been decided by the Supreme Court with reference to the validity of State laws seeking to control the manner of running and operating trains. When the provisions of these laws have been found reasonably necessary for the protection and convenience of the people, and not discriminative against interstate trains, they have been upheld in their application to such interstate trains. Thus State laws have been sustained forbidding the running of freight trains on Sunday;¹¹ forbidding the heating of cars by stoves;¹² requiring trains to stop at county seats;¹³ and other populous centers;¹⁴ requiring locomotive engineers to be examined and licensed by the State authorities;¹⁵ requiring such engineers to be examined from time to time with respect to their ability to distinguish colors;¹⁶ requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the State;¹⁷ requiring railway companies to fix their rates annually for the

¹⁰ 201 U. S. 321.

¹¹ *Hennington v. Georgia* (163 U. S. 299).

¹² *N. Y., etc., Ry. v. N. Y.* (165 U. S. 628).

¹³ *Gladson v. Minnesota* (166 U. S. 427).

¹⁴ *Lake Shore, etc., Ry. v. Ohio* (173 U. S. 285); *Wisconsin M. & P. Ry. Co. v. Jacobson* (179 U. S. 287).

¹⁵ *Smith v. Alabama* (124 U. S. 465).

¹⁶ *Nashville, C. & St. L. R. Co. v. Alabama* (128 U. S. 96).

¹⁷ *Western Union Telegraph Co. v. James* (162 U. S. 650).

transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations;¹⁸ forbidding the consolidation of parallel or competing lines of railway;¹⁹ regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto;²⁰ providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made;²¹ and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent.²² In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce.²³

From the foregoing it will appear that some of the State police regulations which have been sustained in their application to interstate traffic have had for their aim not the health, morals, and safety of the people of the States enacting them, but simply public convenience. In *Lake Shore, etc., Ry. Co. v. Ohio*,²⁴ in which prior decisions upon this point were carefully considered, the court said: "The power of the State, by appropriate legislation, to provide for the public convenience, stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the General Government is to be determined by the same rules."

In *Illinois Central Ry. Co. v. Illinois*²⁵ a State law was held void as unnecessarily restraining interstate commerce which required trains to run out of their regular routes in order to make certain specified stops. So also in *Mississippi Railroad Com. v. Illinois Central Ry. Co.*²⁶ was held void an order of a State railroad commission requiring a railway company to stop its interstate trains at a specified county seat, where proper and adequate passenger facilities were already otherwise provided. In this case the fact that the interstate trains were carrying the mails was given as one of the reasons why they should not be delayed except for substantial reasons. The court said: "The fact that the company has contracts to transport the

¹⁸ *Chicago & N. W. R. Co. v. Fuller* (17 Wall. 560).

¹⁹ *Louisville & N. R. Co. v. Kentucky* (161 U. S. 677).

²⁰ *New York, N. H. & H. R. Co. v. New York* (165 U. S. 628).

²¹ *Chicago, M. & St. P. R. Co. v. Solan* (169 U. S. 133).

²² *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* (169 U. S. 311).

²³ This summary is substantially taken from that given by the court in *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.* (211 U. S. 612).

²⁴ 173 U. S. 285.

²⁵ 163 U. S. 142.

²⁶ 203 U. S. 335.

mails of the United States within a time which requires great speed for the trains carrying them, while not conclusive, may still be considered upon the general question of the propriety of stopping such trains at certain stations within the boundaries of a State." Also the impairment of the ability of the road in question to compete with its rivals was considered. "A wholly unnecessary, even though a small obstacle," the court said, "ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals." Finally, summarizing its position, the court declared: "We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the States through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and, after the wants of the residents within the State or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passenger and freight." So also in *Atlantic Coast Line Ry. Co. v. Wharton*²⁷ was held void an order made under State authority as to the stopping on signal of certain fast mail trains, the argument being that sufficient service was otherwise provided between the points in question.

In *Hall v. De Cuir*²⁸ the court held void as to interstate carriers a State law which prohibited any discrimination against passengers carried within the States, on account of race or color, the argument being that such a regulation in its operation would necessarily affect not merely the local portion of the interstate traffic, but the entire interstate trip.²⁹

²⁷ 207 U. S. 328.

²⁸ 95 U. S. 485.

²⁹ The statute in question, the court said: "does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports to control only the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. . . . No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his

In *McNeill v. Southern Railway Co.*³⁰ the Supreme Court held invalid an order of a State authority compelling a railway, engaged in interstate commerce, to deliver cars containing interstate shipments beyond its own right of way to a private siding. This order, it was declared, "manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce."

However, in *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*³¹ the court upheld an order of a State authority addressed to an interstate carrier to resume the transfer and return of cars between the railway line and the mill of a particular shipper on payment of customary charges. Two dissenting justices held that the case was not to be distinguished from *McNeill v. Southern Ry. Co.*, but the majority held that the order in question was simply to compel the performance by the carrier of its common-law obligation to treat all shippers alike.

In *Chiles v. C. & O. R. Co.*³², however, it was held that congressional inaction in the premises was equivalent to a declaration that public carriers might, of their own volition, separate white and negro interstate passengers. In its opinion the court said: "The interstate commerce clause of the Constitution does not constrain the action of carriers, but, on the contrary, leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such cannot depend upon a passenger being state or interstate."³³

In *Louisville & Nashville Ry. Co. v. Central Stock Yards Co.*³⁴ a provision of the Constitution of Kentucky so applied as to compel a railroad company to receive live stock tendered to it outside of the State, to be delivered to a certain point not its own terminus but in physical connection therewith, was held void.

State laws regulating the prompt delivery of interstate telegraph messages, have generally been upheld. In *Western Union Tel. Co. v. James*³⁵ the court said: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company."

business; and, to secure it, Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

³⁰ 202 U. S. 543.

³¹ 211 U. S. 612.

³² 218 U. S. 71.

³³ In *Louisville, N. O. & T. R. Co. v. Mississippi* (133 U. S. 587) the court had said: "Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by Congress alone."

³⁴ 212 U. S. 132.

³⁵ 162 U. S. 650.

§ 601. State Inspection Laws.

State inspection laws in their application to interstate commerce are sustained in so far as they are reasonable regulations in behalf of the health, safety, and morality of the inhabitants of the States enacting them, or for their protection against fraud, and do not conflict with existing Federal statutes. In *Gibbons v. Ogden* ³⁶ the court said: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the General Government; all of which can be most advantageously exercised by the States themselves."

It will later be seen that when Congress has specifically or inferentially recognized a commodity as a legitimate article of interstate commerce, it may not be excluded by a State from its borders whether by an inspection or other police regulation. And even as to all other articles with reference to which there has been no Federal pronouncement, the requirements of a State inspection law must be reasonable in their provisions. "The only question within the competency of the State authorities, is," as Prentice and Egan say, "whether the article examined is, according to commercial usages of the world, in a fit condition for commerce. It does not belong to the State to decide what articles shall be considered legitimate subjects of trade, nor to make an examination of imported articles for any other purpose than that of protecting the market." ³⁷

An examination of a few of the cases will sufficiently illustrate the established doctrines of the Supreme Court as to State inspection laws.

In *Turner v. Maryland* ³⁸ a State inspection law with reference to tobacco was upheld, which provided the dimensions of the hogshead in which tobacco raised in Maryland should be packed, that the hogsheads should be delivered to one of the State tobacco warehouses for inspection, and that there should be a charge of outage to reimburse the State for the inspection expenses incurred. To the contention made that the law could not properly be termed an inspection law because no provision was made for the opening of the hogsheads and examination of their contents, the court said: "Recognized elements of inspection laws have always been: quality of the article, form, capacity, dimensions and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article

³⁶ 9 Wh. 1.

³⁷ *The Commerce Clause of the Constitution*, p. 155.

³⁸ 107 U. S. 38.

as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion, that the law has ceased to be an inspection law."

In *People v. Compagnie Générale Trans-Atlantique*,³⁹ decided at the same time as *Turner v. Maryland*, the court held void as a regulation of foreign commerce a State law, alleged to be an inspection measure, imposing a tax on every passenger, not a citizen of the United States, from a foreign country landing in the port of New York. In this case it was squarely held that inspection laws, and the words "imports" and "exports" as used in Article I, Section X, Clause 2, of the Constitution, have reference to property exclusively, and not to persons. "We feel quite safe in saying," declared the court, "that neither at the time of the formation of the Constitution nor since has any inspection law included any thing but personal property as a subject of its operation. Nor has it ever been held that the words imports and exports, are used in that instrument as applicable to free human beings by any competent judicial authority."

In addition, the court went on to say, the law in question is invalid in that it "goes far beyond any correct view of the purpose of an inspection law. The commissioners are 'To inspect all persons arriving from any foreign country to ascertain who among them are habitual criminals, or pauper lunatics, idiots or imbeciles . . . or orphan persons without means or capacity to support themselves and subject to become a public charge.' . . . It may safely be said that these are matters incapable of being satisfactorily ascertained by inspection. What is an inspection? Something which can be accomplished by looking at or weighing or measuring the thing to be inspected or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not inspection in any sense whatever. . . . Another section provides for the custody, the support and the treatment for disease, of these persons, and the retransportation of criminals. Are these inspection laws? Is the ascertainment of the guilt of a crime to be made by inspection? In fact, these statutes differ from those heretofore held void, only in calling them in their caption 'inspection laws,' and in providing for payment for any surplus, after the support of paupers, criminals and diseased persons, into the Treasury of the United States; a surplus which, in this enlarged view of what are the expenses of an inspection law, it is safe to say will never

³⁹ 107 U. S. 59.

exist. A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of the word, by calling it so in the title."

In *Minnesota v. Barber* ⁴⁰ was involved a State law passed as an inspection measure which required as a condition of sale of fresh meats in the State that the animals from which such meats were taken should have been inspected in the State before being slaughtered. This was a law which, clearly, would be practically prohibitive of the importation of fresh meat from other States, and the law was very properly held void. "If," the court said, "this legislation does not make such discrimination against the products and business of Minnesota, as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

The court also took occasion to repeat that a law, which, in its operation, whatever its terms, imposes a burden upon interstate commerce is not to be sustained simply because the statute imposing it applies to all the people of all the States including those of the enacting State.⁴¹

In *Scott v. Donald* ⁴² it was held that where a State recognizes as lawful the manufacture, sale, and use of intoxicating liquors, it cannot discriminate against such articles brought in from other States. "It is not an inspection law," said the court. "The prohibition of the importation of the wines and liquors of other States by citizens of South Carolina for their own use is made absolute, and does not depend on the purity or impurity of the articles."

In *Patapsco Guano Co. v. Board of Agriculture* ⁴³ and *Asbell v. Kansas* ⁴⁴ the various adjudications of the Supreme Court with reference to State inspection laws are summarized and reviewed.

§ 602. State Quarantine Laws.

The enactment and enforcement by the States of quarantine laws, whether with reference to persons or to property, has given rise to numerous cases in which their constitutionality as tested by the commerce clause has been considered. Quarantine laws are, of course, but a variety of police laws, and their validity is determined as such. That is to say, as declared in *Railroad Co. v. Husen*,⁴⁵ "while for the purpose of self-protection it [the State] may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection." In *Railroad Co. v. Husen* was in question an act of the State of Missouri which provided

⁴⁰ 136 U. S. 313.

⁴¹ See also *Brimmer v. Rebman* (138 U. S. 78).

⁴² 165 U. S. 58.

⁴³ 171 U. S. 345.

⁴⁴ 209 U. S. 251.

⁴⁵ 95 U. S. 465.

that "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into or remain in any county in this State between the first day of March and the first day of November in each year by any persons or persons whatever." This act, claimed to be a quarantine measure, the court held void, saying: "The statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December [November] 1 in any year, no matter whether they are free from disease or not; no matter whether they may do an injury to the inhabitants of the State or not.' . . . Such a statute, we do no doubt, it is beyond the power of a State to enact."

In *Morgan's L. & T. R., etc., Co. v. Louisiana Board of Health* ⁴⁶ a State law was upheld as a reasonable quarantine measure, though admitted to be, in a measure, a regulation of commerce.

In *Rasmussen v. Idaho* ⁴⁷ was sustained a law of a State authorizing the Governor thereof, when he has reason to believe that there is an epidemic of infectious disease of sheep in localities outside of the State, to investigate the matter, and if he finds that the disease exists, to make a proclamation declaring such localities infected and prohibiting the introduction therefrom of sheep into the State, except under such restrictions as may seem proper. Distinguishing the act from that held void in the *Husen* case, the court said: "It will be perceived that this is not a continuous act, operating year after year irrespective of any examination as to the actual facts, but is one contemplating in every case investigation by the chief executive of the State before any order of restraint is issued. Whether such restraint shall be total or limited, and for what length of time, are matters to be determined by him upon full consideration of the condition of the sheep in the localities supposed to be affected. The statute was an act of the State of Idaho, contemplating solely the protection of its own sheep from the introduction among them of an infectious disease, and providing for only such restraints upon the introduction of sheep from other States as in the judgment of the State was absolutely necessary to prevent the spread of disease. The act therefore is very different from the one presented in *Hannibal & St. J. R. Co. v. Husen* (95 U. S. 465) and is fairly to be considered a purely quarantine act, and containing within its provisions nothing which is not reasonably appropriate therefor."

In *Smith v. St. Louis, etc., Ry. Co.* ⁴⁸ were sustained quarantine regulations established by the governor of the State on recommendation of a live-stock commission in pursuance of a law whereby the importation of all cattle from the State of Louisiana for a certain period was prohibited, be-

⁴⁶ 118 U. S. 455.

⁴⁷ 181 U. S. 198.

⁴⁸ 181 U. S. 248.

cause the commission had reason to believe that anthrax had or was liable to break out in that State.

In *Reid v. Colorado*⁴⁹ was sustained a State law prohibiting the importing of cattle from south of the thirty-sixth parallel of north latitude between certain dates, unless first kept for ninety days at some State north of that parallel or unless a certificate of freedom from contagious disease had been obtained from the State veterinary sanitary board. These provisions, were, in view of the surrounding circumstances, held to be reasonable sanitary precautions.

In *Compagnie Française, etc. v. State Board of Health of Louisiana*⁵⁰ the subject of State quarantine was again carefully considered, and especially in its relation to the existing immigration and quarantine acts of the General Government. These Federal laws, it was held, were not intended to and did not abrogate the existing State quarantine systems.

In *Oregon-Washington R. & Nav. Co. v. Washington*,⁵¹ it was held that in absence of action taken by Congress in the matter, a State may, in the exercise of its police power, establish quarantines against human beings, animals or plants which may infect inhabitants, animals or plants in the State. In this case the earlier cases were reviewed and especial weight given to *Reid v. Colorado*.⁵²

§ 603. Federal Quarantine Laws.

No legislative power with reference to quarantine is specifically given to the Federal Government by the Constitution, but that government has very broad powers on the subject as incidental to its control of foreign and interstate commerce, admiralty and maritime matters, and foreign relations. To only a moderate extent, however, has this Federal power been exercised.⁵³

§ 604. State Game Laws.

Wild game within a State is not, until reduced to possession, private property, but belongs to the State, which is conceded to have a police power to fix the times and the methods by which it may be captured and killed, or, when taken, may be sold. In their efforts to protect their game supplies the States have at times enacted game laws the validity of which has been contested as being regulations of interstate commerce. An examination of the case of *Geer v. Connecticut*⁵⁴ will sufficiently illustrate the points involved.

⁴⁹ 187 U. S. 137.

⁵¹ 270 U. S. 87.

⁵⁰ 186 U. S. 380.

⁵² 187 U. S. 137.

⁵³ See *American Law Review*, XLIII, 382, article "Federal Quarantine Laws," for an account of this legislation. For a recent case, see *Thornton v. United States* (271 U. S. 414).

⁵⁴ 161 U. S. 519.

In this case the law in question declared it unlawful to have in possession game for transportation beyond the State, even though such game had been lawfully killed during the "open" season. Thus the question was whether the State could permit such game to be killed and used within the State, and yet forbid its transportation to another State. After a careful examination of the nature of the State's ownership and control of wild game, the court said:

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game killed within the State, beyond the State, is to confine the use of such game to those who own it, the people of that State. The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other States to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the State has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the State has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of state commerce, as a resulting necessity such property has become the subject of interstate commerce, hence controlled by the provisions of U. S. Const., art. 1, § 8. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the State are allowed, it thereby becomes commerce within the legal meaning of that word. In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the State, it may well be doubted whether commerce is created by an authority given by a State to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the State. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State, under the provision in question, created internal State commerce, it does not follow that such internal commerce becomes necessarily the subject

matter of interstate commerce, and therefore under the control of the Constitution of the United States."

And in conclusion the court said: "The power of a State to protect by adequate police regulation its people against the adulteration of articles of food . . . although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good."

In New York *ex rel. Silz v. Hersterberg* ⁵⁵ it was held that a State law which prohibited the possession of game out of season was not a denial of due process of law, even as to game taken in foreign countries during the open season there; nor was it an unconstitutional interference with interstate commerce.

In *Foster-Fountain Packing Co. v. Haydel*, ^{55a} it was held that a State is without power to prevent privately owned goods from being shipped in interstate commerce on the ground that they were needed to satisfy needs of the people of the State. This was declared in connection with a State law, which was held invalid, which forbade the shipping of raw and unshelled shrimp out of the State, but which permitted such shipping of shrimp products produced and prepared within the State. The law was sought to be sustained as a measure for conserving natural products of the States to the inhabitants thereof, but the court found that this was but its feigned and not its real purpose. Distinguishing the instant law from the one sustained in *Geer v. Connecticut*, the court said:

"The purpose of the Louisiana enactment differs radically from the Connecticut law there upheld. It authorizes the shrimp meat and bran, canned and manufactured within the state, freely to be shipped and sold in interstate commerce. The state does not require any part of the shrimp to be retained for consumption or use therein. Indeed only a small part is consumed or needed within the state. Consistently with the act, all may be, and in fact nearly all is, caught for transportation and sale in interstate commerce. As to such shrimp, the protection of the commerce clause attaches at the time of the taking. [Citing cases.] As the representative of its people, the state might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the state. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be

⁵⁵ 211 U. S. 31.

^{55a} Decided October 15, 1928.

taken and all the products thereof to be shipped and sold in interstate commerce, the state necessarily releases its hold, and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the state is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause."

§ 605. Other State Laws Affecting Interstate Commerce.

Among more recent cases in which the constitutional power of the States to regulate intrastate commerce, even though interstate commerce may be incidentally affected, the following may be noted:

In *Southern R. Co. v. King* ⁵⁶ it was held that, in the absence of congressional action, a State might regulate the manner in which interstate trains shall approach dangerous crossings.

In *Chicago, R. I. & P. R. Co. v. Arkansas*, ⁵⁷ it was held that, as a measure of safety, for trains operated in the State a State might prescribe a minimum of three brakemen for a freight train of more than twenty-five cars.

In *St. Louis, I. M. & S. R. Co. v. Arkansas* ⁵⁸ it was held that interstate commerce was not unconstitutionally interfered with by a State law which forbade railway companies with yards or terminals in cities in the State from conducting switching operations across public crossings with a switching crew of less than an engineer, a fireman, a foreman, and three helpers.

In *South Covington & C. S. R. Co. v. Covington* ⁵⁹ it was held that, even in the absence of congressional regulation, a State might not restrict the number of passengers which an interstate carrier might admit to its cars when compliance with the regulation would compel the company to operate one-half more cars than it was already operating and more than could be operated in the city of Cincinnati under its franchise rights. "We think," said the court, "the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington [Kentucky] and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati [Ohio] and the manner of loading them when there. . . . If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply." However, in this same case it was held that other provisions of the State ordinance in question which related to passengers riding on rear platforms, to the ventilation and fumigation of cars, etc., were within the State's regulatory powers.

⁵⁶ 217 U. S. 524.

⁵⁷ 219 U. S. 453.

⁵⁸ 240 U. S. 518.

⁵⁹ 235 U. S. 537.

In *Sligh v. Kirkwood* ⁶⁰ it was held that, until Congress should act in the premises, a State might regulate the delivery for shipment in interstate commerce of citrus fruits which were immature or unfit for consumption. The court said: "It may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the State from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of State regulation.

"We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market. The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the State. The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

In *Chicago, B. & A. R. Co. v. Railroad Commission* ⁶¹ it was held that the requirement of a State law that every village having two hundred or more inhabitants and a post office, and being within an eighth of a mile of a railroad should be given by such a railroad at least two passenger trains each way each day, if four or more passenger trains were run each day each way, and without regard to the adequacy or inadequacy of the existing passenger service, was unconstitutional as applied to a railroad operating only interstate trains.

In *Gulf, C. & S. F. R. Co. v. Texas* ⁶² it was held that interstate commerce was not unduly and unconstitutionally interfered with by a State law which required the stoppage of passenger trains at a county seat, where it appeared that the county seat in question was the only one at which the trains were not stopping, and that only four or five minutes in the case of one train, and ten minutes in the case of another train, was required for making such stops. The court said: "The law is not directed adversely at interstate trains, but expresses the specific judgment of the legislature as to the needs of the county seats, all of which, of course, it knew. If its judgment

⁶⁰ 237 U. S. 52.

⁶¹ 237 U. S. 220.

⁶² 246 U. S. 58.

is correct, which we have no grounds for denying, the order may be justified, so far as its interference with interstate commerce is concerned, unless some other facts show that the burden is too great."

In *St. Louis & S. F. R. Co. v. Missouri*⁶³ it was held that an undue burden on interstate commerce was imposed by a State regulation requiring an interstate railway to detour trains in order to pass through a particular city where the city already was served by local trains which met its reasonable requirements. Substantially the same holding was made by the court in *St. Louis, S. F. R. Co. v. Missouri*,⁶⁴ decided a little more than two years later.

In *Western Union Telegraph Co. v. New Hope*⁶⁵ and *Atlantic & Pacific Tel. Co. v. Philadelphia*⁶⁶ the court has laid down the doctrine that where, from the nature of the case, a certain amount of police supervision of an interstate carrier on the part of the State or of one of its political subdivisions is needed, a charge, in the form of a tax, sufficient to meet approximately the expenses of such supervision may be imposed by the State or its political subdivisions. The fact that, in result, a revenue somewhat greater than the actual cost of supervision is derived does not render the tax void, but such excess cannot be sufficient to make the tax essentially a revenue measure.

"Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts and not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and expense of the same." In *Atlantic & Pacific Tel. Co. v. Philadelphia*, however, the court pointed out that the function of the court, as to the reasonableness of the regulation, is to pass upon the character of the regulations prescribed, and whether a charge upon the supervised company is proper; and that it is the function of the jury to pass upon the question as to the reasonableness of the amount of the charge in the particular case at issue. "What is reasonable in one municipality may be oppressive and unreasonable in another."

In *Michigan Public Utilities Commission v. Duke*⁶⁷ it was held that, as applied to private carriers exclusively engaged in interstate commerce, a State law was unconstitutional which required all persons engaged in the business of transporting persons or property for hire by motor vehicles over public highways should be deemed common carriers, and be prohibited from engaging in such business without a permit, and requiring them to carry insurance or execute indemnity bonds.⁶⁸

⁶³ 254 U. S. 535.

⁶⁴ 261 U. S. 369.

⁶⁵ 187 U. S. 419.

⁶⁶ 190 U. S. 160.

⁶⁷ 266 U. S. 570.

⁶⁸ The law in question was also declared to be in violation of the due process clause of the Fourteenth Amendment.

From the foregoing it will appear that the cases rest upon their individual merits and that the Supreme Court will, in each instance, determine, in the first place, whether the State regulation is or is not directed directly or in a discriminating way against interstate commerce, and, in the second place, whether the law has a reasonable justification as a police measure, that is, one which will excuse and justify an incidental and not too heavy an interference with interstate commerce.

§ 606. State Control of Motor Vehicles on State Highways.

The constitutional right of the States to regulate motor vehicles, even though interstate commerce be thereby incidentally affected, is strengthened when these vehicles are using highways which have been constructed and maintained, wholly or in part, by the States. The respective constitutional rights of the Federal Government and the States in this respect received their first careful consideration in *Hendrick v. Maryland*,⁶⁹ decided in 1915. In that case it was held that, in the absence of congressional legislation, a State might prescribe uniform regulations reasonably necessary for the public safety and order in respect to the operation of motor vehicles upon their highways, even though such vehicles were moving in interstate commerce. The State law upheld in this case required the registration of such vehicles, the licensing of their drivers, and a reasonable charge for such registration, based upon the horse power of the vehicles, and for the drivers' licenses. The Maryland law also provided that non-residents of the State in order to have limited use of the highways without cost must have complied with similar laws in their respective States. All moneys collected under the act, except so much as might be necessary for salaries and other expenses for the enforcement of the act, were to be used in the construction, maintenance, and repairing of the streets of the city of Baltimore, and of roads built or aided by a county or by the State itself.

In *Kane v. New Jersey*,⁷⁰ a substantially similar law of the State of New Jersey was upheld.⁷¹

In *Michigan Public Utilities Com. v. Duke*,⁷² a new set of facts was involved. Here the State law provided that no person should engage in the business of transporting persons or property by motor vehicles for hire over the public highways of the State over fixed routes or between fixed termini without a permit so to do obtained from the Public Utilities Commission of the State,—a permit which might be refused if the applicant was not able to

⁶⁹ 235 U. S. 610.

⁷⁰ 242 U. S. 160.

⁷¹ This law, unlike the Maryland law, provided that non-residents should appoint an agent within the State upon whom process might, if necessary, be served. This requirement, the court held, was not unduly burdensome and did not deny to non-residents the equal protection of the law. "On the contrary, it puts non-resident owners upon an equality with resident owners."

⁷² 266 U. S. 570.

show that he was able to furnish adequate, safe, or convenient service to the public; and that all common carriers within the purview of the act should take out indemnity bonds, in an amount to be fixed by the Utilities Commission, for the payment of all just claims and liabilities resulting from injury to property carried by such carriers. The appellee in this case was a private carrier engaged solely in interstate commerce. Upon an appeal from an order granting an interlocutory injunction restraining the appellants from enforcing the act against the appellee, the Supreme Court held the act invalid as a direct interference with interstate commerce. The court said: "The act would put on plaintiff the duty to use his trucks and other equipment as a common carrier in Michigan, and would prevent him from using them exclusively to perform his contracts. This is to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged as a private carrier and so directly to burden and interfere with it. And it is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier, and the obligation of furnishing such indemnity bond to cover the automobile bodies hauled under his contracts as conditions precedent to his right to continue to carry them in interstate commerce. Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways. The police power does not extend so far. It must be held that, if applied to plaintiff and his business, the act would violate the commerce clause of the Constitution.

"Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment."

In *Frost v. Railroad Commission of California*⁷³ it was held that the plaintiff in error, who was engaged under a single private contract in transporting for a stipulated compensation certain goods over the public highway of a State between fixed termini, could not, without a denial to him of due process of law, be declared to be a public carrier, and, as such, be compelled to submit to the requirements of the State law governing the use by public carriers of the State's public highways. While admitting that the State might, in proper cases, prohibit the use of public highways, the court said that the act, as applied to the plaintiff in error, was in no sense a regulation of the use of the public highways. "It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling

⁷³ 271 U. S. 583.

competitive conditions. Protection or conservation of the highways is not involved."⁷⁴

In *Buck v. Kuykendall*⁷⁵ the court held invalid a State law which prohibited the use of the highways of the State by busses transporting passengers for hire over regular routes without a certificate from the Director of Public Works of the State, and which further provided that such certificate should not be issued if the territory were deemed to be already adequately served. Contrasting this law with those State laws which, in previous cases, had been upheld, the court said: "The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through State officials, to a test which is peculiarly within the province of the Federal action—the existence of adequate facilities for conducting interstate commerce."

In *Bush & Sons Co. v. Maloy*,⁷⁶ decided at the same time as the *Buck* case, the court held invalid a Maryland law which prohibited common carriers of freight by motor vehicles from using the public highways of the State over specified routes without first obtaining permits from the Public Service Commission of the State, and which gave to such Commission discretion in the matter of issuing such permits.⁷⁷

In *Morris v. Duby*⁷⁸ a State law was upheld which reduced the maximum load of motor trucks operated on State highways constructed and maintained by Federal aid in accordance with Federal laws the provisions of which had been assented to by the State. The court said that the acts

⁷⁴ Justices Holmes, Brandeis and McReynolds dissented.

⁷⁵ 267 U. S. 307.

⁷⁶ 267 U. S. 317.

⁷⁷ In the course of its opinion the court said: "This case presents two features which were not present in *Buck v. Kuykendall*, decided this day. The first is that the highways here in question were not constructed or improved with Federal aid. This difference does not prevent the application of the rule declared in the *Buck* Case. The Federal aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that State highways shall be open to interstate commerce. The second feature is that here the permit was refused by the commission, not in obedience to a mandatory provision of the State statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference also is not of legal significance in this connection. The State action in the *Buck* Case was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the director of public works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the commerce clause for Federal regulation."

⁷⁸ 274 U. S. 135.

of Congress did not disclose any provision, express or implied, of withholding from the State any of its ordinary police power to conserve the highways in the interest of the public. "The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable. That it prevents competition with freight traffic on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair. In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the highway commission upon this question which is committed to their decision as against merely general averments denying their official finding."

In *Clark v. Poor*⁷⁹ it was held that users of public highways, though engaged exclusively in interstate commerce, are subject to reasonable State regulations as regards safety, convenience and the conservation of the highways, and that common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use by the State. The court pointed out that, in the instant case, there was no suggestion that the tax discriminated against interstate commerce, or that it was so large as to obstruct that commerce. "It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act, and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

In *Hess v. Pawloski*⁸⁰ it was held that due process of law was not denied by a State law which declared that the use of its highways by non-resident operators of motor vehicles should be deemed equivalent to the appointment by such non-residents of the State registrars as agents upon whom process might be served for initiating proceedings against them growing out of collisions or accidents in which they might be involved on such highways, but requiring that the non-residents should actually receive and receipt for notice of the service of such processes, and that they should be given a reasonable time and opportunity for defence.

In *Wuchter v. Pizzutti*⁸¹ it was emphasized that a State law designating a State official as the person to receive service of process in an action against a non-resident must contain a provision which makes it reasonably probable that the notice will be communicated to the person sued. The

⁷⁹ 274 U. S. 554.

⁸⁰ 274 U. S. 352.

⁸¹ 276 U. S. 13.

court said: "Every statute of this kind, therefore, should require the plaintiff bringing the suit to show in the summons to be served the post-office address or residence of the defendant being sued, and should impose either on plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant."

In *Sprout v. South Bend* ⁸² it was held that a motor bus was engaged in intrastate business even though it required persons taken up and discharged within a State to purchase tickets to points outside the State. The provision that persons operating motor busses should secure liability insurance from an insurer authorized to do business within the State was held to be within the power of the State, which power might be delegated to a municipality, and applied to persons doing an interstate business. The doctrine was also again stated that, in the absence of Federal regulation concerning the subject the States may exact license fees of vehicles using its highways exclusively in interstate commerce, provided these fees are not discriminatory as regards interstate commerce, and not larger in amount than is reasonably necessary to defray the expenses of administering the State's regulations for the promotion of the safety and convenience of the public. It was also held that the States may impose on motor vehicles engaged exclusively in interstate commerce a reasonable charge as a fair contribution towards the cost of constructing and maintaining the State's public highways; or they may levy upon the operators of vehicles engaged in both intrastate and interstate commerce an occupation tax provided it appear that the tax is imposed solely upon the intrastate business and its payment is not made a condition precedent to the permission to engage in the interstate business.

⁸² 277 U. S. 163.

CHAPTER LV

THE ORIGINAL PACKAGE DOCTRINE

§ 607. The Original Package Doctrine.

The right to import, including the right of the importer to sell the goods imported, and the right to engage in interstate and foreign commerce being a Federal right, the States have no more constitutional power to restrain or regulate the sale of imported commodities by the importer than they have to prevent or regulate their being brought within the State.

This principle was first clearly declared by Marshall in *Brown v. Maryland*.¹ "Sale," declared the Chief Justice, "is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. . . . Congress has a right not only to authorize importation, but to authorize the importer to sell."

The case of *Brown v. Maryland* had to deal with foreign commerce and it seemed for a number of years that its application would be limited to that commerce. Indeed, that this was so was intimated as late as 1886 in *Robbins v. Taxing District*.² But in *Bowman v. Northwestern Railroad*,³ decided in 1887, the reasoning indicated that the doctrine would be applied to interstate commerce, and, in *Leisy v. Hardin*,⁴ decided in 1890, this was squarely declared and has since been repeatedly affirmed.

The fact that the right to engage in commerce carries with it the right to sell the goods transported, does not, it has been held, exclude the right of the State to tax goods brought from another State still unsold, and still in their original packages, provided such goods be not discriminated against because of their having been brought into the State from another State. As to imports from foreign countries, however, the rule is that until sale in the original package, or until the breaking of the package, no State tax may be imposed. This prohibition is, however, not drawn from the Commerce Clause but from the express provision of the Constitution that "No State shall, without the consent of Congress, lay any impost or duty on imports or exports" (Art. I, Sec. X).

From the foregoing it appears that the State's authority over articles brought in from the other States does not attach, except for purposes of taxation, until the articles so brought in have been sold. However, as is elsewhere shown, this rule is modified by the doctrine that, whether sold or not, the articles brought in lose their interstate commercial character,

¹ 12 Wh. 419.

² 120 U. S. 489.

³ 125 U. S. 465.

⁴ 135 U. S. 100

and full State authority at once attaches, as soon as these articles have in any way become mixed with the general mass of the property of the State to which they have been transported. As a convenient test for determining when this commingling takes place, the Supreme Court early developed the so-called "Original Package" doctrine. This doctrine is that so long as the commodity is kept in the unbroken package in which it is delivered to the carrier for transportation, no commingling with the State goods has taken place. At times this has been stated by the courts and by commentators as an absolute rule. In fact, however, as will appear from the cases which will be reviewed, the doctrine does not state a right to which the exporter is entitled, but declares a test which the court frequently finds convenient to apply for determining when commingling of the imports with State goods has taken place, but which in other cases may be held inapplicable because of the character of the goods transported.

The original package doctrine was first stated by Marshall in *Brown v. Maryland*⁵ with reference to the prohibition laid upon the States as to the taxation of exports and imports. "There must be," said the Chief Justice, "a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country . . . it is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."⁶ It was in this case, it will be remembered, that the doctrine was laid down that sale is the object of, and an essential ingredient of commerce.

In *Bowman v. Railway Co.*⁷ the court had held that a State could not forbid a common carrier to bring intoxicating liquor into the State from another State or Territory except upon the conditions mentioned in the act. In *Leisy v. Hardin*⁸ the court took the further step of declaring that the importers had the right to sell in the original packages, unopened and unbroken, articles brought into the State from another State or Territory, notwithstanding a statute of the State prohibiting the sale of such articles except for the purposes mentioned therein and under a license from the State. This statute the court held unconstitutional, saying: "Under the

⁵ 12 Wh. 419.

⁶ As already observed, and as will later be more fully discussed, articles of interstate commerce are, while in their original packages and in the hands of the importer, subject to taxation by the State in which they are.

⁷ 125 U. S. 465.

⁸ 135 U. S. 100.

decision in *Bowman v. Railway Co.* they had the right to import beer into that State, and, in the view which we have expressed, they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of congressional permission to do so, the State had no power to interfere, by seizure or any other action, in prohibition of importation and sale by the foreign or non-resident importer."⁹

In *Schollenberger v. Pennsylvania*¹⁰ the original package test was applied to interstate shipments of oleomargarine.

In *Low v. Austin*¹¹ the doctrine of *Brown v. Maryland*¹² was so applied to foreign commerce as to invalidate a State tax whether imposed upon goods as imports or upon them as a part of the general property of citizens of the State. The court said: "The goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax." This holding, it will be observed was as to imports from abroad.

The breaking of the "Original Package" must be for purpose of sale.¹³

However, there is some ground for holding that the States may exercise their police powers with reference to goods in interstate commerce, even in the original packages, if the goods are such as are, in themselves, dangerous to the health or safety of the inhabitants of the States, e. g., explosives, diseased cattle, etc. Thus, in *Williams v. Walsh*,¹⁴ the court upheld a State law which made it unlawful to sell or deliver black powder for use in coal mines in the State except in original sealed packages of a certain specified character. It did not appear in the case that the plaintiff was an importer, but, referring to this fact, the court said (speaking *obiter*), "We do not wish to be understood as intimating that if such proof had been made, it would have been a defence. Powder is an explosive, dangerous to handle, the degree of danger corresponding to its quantity. It is subject, therefore, to a measure of regulation from which harmless articles of commerce may be exempt."¹⁵

⁹ Three justices dissented on the ground that the State law was a legitimate exercise of the police power.

¹⁰ 171 U. S. 1.

¹¹ 13 Wall. 29.

¹² 12 Wheat. 419.

¹³ *May v. New Orleans* (178 U. S. 496).

¹⁴ 222 U. S. 415.

¹⁵ Citing *Nashville, C. & St. P. R. Co. v. Alabama* (128 U. S. 96); *Foster v. Kansas* (112 U. S. 206); *Plumley v. Massachusetts* (155 U. S. 461); *Austin v. Tennessee* (179 U. S. 343) and *Asbell v. Kansas* (209 U. S. 251).

§ 608. Difficulties in Applying Original Package Doctrine.

The original package doctrine, simple in itself, becomes at times difficult, and, indeed, impossible of strict application because it is sometimes not easy to determine what is to be considered the original package which, until broken, preserves the commodity from State control. In some cases, indeed, there is no package whatever to be broken. These difficulties are illustrated in the cases which follow.

In *May & Co. v. New Orleans*¹⁶ it was contended as to certain foreign imports, that the original packages were not the larger boxes, cases, or bales in which the goods were imported, but the smaller packages contained therein, and that until these latter were broken, the commingling with the other goods of the States to which they had been brought did not take place. The court, however, held that the larger case or bale was the original package.¹⁷

¹⁶ 178 U. S. 496.

¹⁷ "Let us first inquire as to the consequences that may follow from the interpretation of the clause of the Constitution relating to State taxation of imports, upon which the plaintiffs rest their case. In the view taken by them it would seem to be immaterial whether the separate parcels or packages brought from Europe were left in the shipping box, case, or bale after it was opened, or were taken out and placed on the shelves or counters in the store of the importer for delivery or sale along with goods manufactured or made in this country. In other words, they argue that the importer may sell each separate package either from the box in which it was transported, after it is opened, or from the shelves or counters in his store, without being subjected to local taxation in respect of any packages so brought into the country, provided such separate packages be sold or offered for sale in the form in which it was when placed in the box, case, or bale by the European manufacturer or packer. This means that the power of the State to tax goods, the product of other countries depends upon the particular form in which the European manufacturer or packer of his own accord or by direction of the importer, has put them up in order to be sent to this country. The necessary result of this position is that every merchant selling only goods of foreign manufacture, in separate packages, although enjoying the protection of the local government acting under its police powers, may conduct his business, however large, without any liability whatever to State or local taxation in respect of such goods, provided he takes care to have the articles imported separately wrapped and placed in that form in a box, case, or bale for transportation to and sale in this country. In this view, if a jeweller desires to buy fifty Geneva watches for the purpose of selling them here without paying taxes upon them as property, he need only direct them to be placed in separate cases, however small, and then put them all together in one box. After paying the import duties on all the watches in the box, and receiving the box at his store, he may open the box and the watches, each one being in its own separate case, may then be exposed for sale. According to the contention of the plaintiffs, each watch, in its own separate case, would be an original package, and could not be regarded as part of the mass of property of the State and subject to local taxation, so long as it remained in that form and unsold in the hands of the importer. Other illustrations arising out of the business of American merchants will readily occur to everyone. The result would be that there might be upon the shelves of a merchant in this country, ready to be used and openly exposed for sale, commodities or merchandise consisting of articles separately wrapped and of enormous value that could not be reached for local taxation until after he had sold them,

In *Austin v. Tennessee*,¹⁸ decided six months after the *May* case, the court was confronted by a case in which there was no larger bundle or case, the articles in question—cigarettes—being shipped and transported in small paper packages, without, however, being separately addressed, these packages being taken from loose piles of such packages at the factory by the express company in baskets furnished by the express company, transported in such baskets, and emptied therefrom on the counters of the consignees in the States to which shipped. Here, though there was no larger box or bale, the court declined to hold the small packages to be the “original” packages, and said that the original package, if there were one, was the basket.

The court said: “The case under consideration is really the first one presenting to this court distinctly the question whether, in holding that the State cannot prohibit the sale in the original package of an article brought from another State, the size of the package is material.” After citing cases, in which, however, this question had been foreshadowed, the court continued: “The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the

no matter how long they had been kept by the importer before selling them. It cannot be overlooked that the interpretation of the Constitution for which the plaintiffs contend would encourage American merchants and traders seeking to avoid State and local taxation, to import from abroad all the merchandise and commodities which they would need in their business. There are other considerations that cannot be ignored in determining the time at which goods imported from foreign countries lose their character as imports and may be properly regarded as part of the general mass of property in the State, subject to local taxation. If, as the plaintiffs insist, each parcel separately wrapped and marked and put in the shipping box, case, or bale, is an original package which, until sold, no matter when, would retain its distinctive character as an import, although the box, case, or bale containing them had been opened and the separate parcels all exposed for sale, what stands in the way of European manufacturers opening branch houses in this country, and selling all their goods put up in the form of separate parcels and packages, without paying anything whatever by way of taxation on their goods as property protected by the laws of the State in which they do business? Indeed, under plaintiff's view, the Constitution secures to the manufacturers of foreign goods imported into this country an immunity from taxation that is denied to manufacturers of domestic goods. An interpretation attended with such consequences ought not to be adopted if it can be avoided without doing violence to the words of the Constitution. Undoubtedly the payment of duties imposed by the United States on imports gives the importer the right to bring his goods into this country for sale, but he does not, simply by paying the duties, escape taxation upon such goods as property after they have reached their destination for use or trade, and the box, case, or bale containing them has been opened and the goods exposed to sale.” “In our judgment,” the court concluded, “the ‘original package’ in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of goods lost its distinctive character as an import and became property subject to taxation by the State as other like property situated within its limits.”

Four justices dissented without, however, stating their reasons.

¹⁸ 179 U. S. 343.

size of the package in which the *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers, who have been in the habit of breaking the packages and distributing their contents among the several retail dealers throughout the State. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up. But taking the words 'original package' in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other States in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the State against their importation and sale. In all the cases which have heretofore arisen in this court the packages were of such size as to exclude the idea that they were to go directly into the hands of the consumer, or be used to evade the police regulations of the State with regard to the particular article. No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and a *bona fide* package of a particular size. Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another State, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. . . . Practically the only argument relied upon in support of the theory that these packages of ten cigarettes are original packages is derivable from the Revised Statutes, § 3392, which requires that manufacturers shall put up all cigarettes made by or for them, and sold or removed for consumption or use, in packages containing ten, twenty, fifty, or one hundred cigarettes each. This, however, is solely for the purpose of taxation—a precaution taken for the better enforcement of the internal revenue law, and to be read in connection with Section 3243, which provides that 'the payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State.'"¹⁹

¹⁹ Four justices dissented.

In this Austin case, it is clear that the court was not at all sure that, from the very circumstances of the case, the original package doctrine was applicable; and this became still clearer in *Cook v. Marshall*,²⁰ decided in 1905, in which there was not even a basket, the small packages being shipped absolutely loose, and, presumably, shoveled into and out of the car, and delivered in that condition to their consignees. The court, however, held that these small packages, even before opening, were subject to the police and taxing powers of the State.

These cases sufficiently establish the fact that the original package doctrine is not so much a rule necessarily to be followed by the court for fixing precisely the time at which interstate commercial transactions end and the full State authority over the articles transported attaches, as it is a test which in many cases may conveniently be applied for determining this fact. And that when the nature of the case is such as to render this test inapplicable, the court will have to ascertain from other circumstances whether or not interstate commerce has ended.

In *McDermott v. Wisconsin*²¹ the court held that the word "package" or equivalent expressions, as used by Congress in the Food and Drug Act of June 30, 1906,²² was intended to refer to the immediate containers of articles and not simply to the outside wrappers or boxes containing the packages intended to be purchased by consumers. As thus construed, the court held that a State law permitting the sale of certain goods only when bearing the labels prescribed by the State was an unlawful attempt to discredit and burden legitimate Federal regulations of interstate commerce. To the contention on behalf of the State that its regulations affected the branding or labelling of goods only after they had come into the possession of the merchants and held upon their shelves for sale, and that the goods involved in the case had been removed from the boxes in which they had been shipped into the State, and that, therefore, they had passed beyond regulation by Congress under its interstate commerce power, the court said, with reference to the original package doctrine: "Some of the cases in which this doctrine has been considered will be found in the margin."²³ In the view, however, which we take of this case, it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its Constitutional limitations of authority, Congress may determine for itself the character of the means necessary to make its purpose effectual,

²⁰ 196 U. S. 261.

²¹ 228 U. S. 115.

²² 34 Stat. at L. 768.

²³ The following cases were cited: *Leisy v. Hardin* (135 U. S. 100); *Rhodes v. Iowa* (170 U. S. 412); *Schollenberger v. Pennsylvania* (171 U. S. 1); *May v. New Orleans* (178 U. S. 496); *Austin v. Tennessee* (179 U. S. 343); *American Steel & Wire Co. v. Speed* (192 U. S. 500); *Cook v. Marshall County* (196 U. S. 261); *Heyman v. Southern R. Co.* (203 U. S. 270); *Savage v. Jones* (225 U. S. 501); *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192.

in preventing the shipment in interstate commerce of articles of a harmful character, and to this end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the act, and when § 2 has been violated, the Federal authority, in enforcing either § 2 or § 10, may follow the adulterated or misbranded article at least to the shelf of the importer. . . . The opportunity for inspection *en route* may be very inadequate. The real opportunity of government inspection may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the articles are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make efficient regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose for which the act was intended.

"The doctrine of original package had its origin in the opinion of Chief Justice Marshall in *Brown v. Maryland*, already referred to. It was intended to protect the importer in the right to sell the imported goods which was the real object and purpose of importation. To determine the time when an article passes out of the interstate into State jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a Federal prohibition becomes immune. The doctrine was not intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end. The legislative means provided in the Federal law for its own enforcement may not be thwarted by State legislation having a direct effect to impair the efficient exercise of such means."

In *Rost v. Van Deman & Lewis Co.*²⁴ the original package doctrine was again subjected to a careful examination with reference to the constitutionality of a State statute which imposed a license tax upon merchants the amount of which was based upon the cash value of "stock of merchandise," with the proviso that persons or firms offering with merchandise sold in the course of trade coupons, profit-sharing certificates or other evidences of indebtedness or liability, redeemable in premiums, should pay a State license tax of \$500 and a county license tax of \$250 in each and every county in which they might conduct their business. In the instant case, which was one to restrain the enforcement of this act, it was alleged that the statute was unconstitutional not only as a denial of due process of law and of the equal protection of the law, but that, as to goods imported into the State, it was an interference with interstate commerce. As to this latter conten-

²⁴ 240 U. S. 342.

tion the court pointed out that the giving of the "trading stamps," certificates, etc., was not designed for, or executed through, a sale of the original packages of importation, but on the sale of the retail packages to the purchasers and consumers. "This," said the court, "fixes their character as transactions within the State, and not as transactions in interstate commerce. . . . All of the schemes have their influence and effect within the State. Nor is such influence and effect changed or lessened by the redemption of the tokens outside of the State." This conclusion was reached by the court although it appeared that the packages which were sold, and in which the coupons or stamps or other certificates were inclosed, were wrapped or boxed and shipped by the manufacturer or producer from his place of business outside the State to the merchants in the State, generally to wholesale dealers, and by them sold to retailers, who sold them in the same packages or cases to their customers. "Detach," said the court, "the importations from the retail sale, consider only the transportation to the State of merchandise in its original package, being sold therein in such package, and there may, indeed, be interstate commerce; but so detached and so considered the importations are left without purpose, the schemes without execution. Indeed, complainants contend for the right not only of importations in the original packages containing the coupons, but the disposition of the goods and coupons through the retail merchant. This, we repeat, has no protection in the commerce clause." In other words, the court held that the feature of the sales, namely, the giving in connection therewith of premium coupons, trading-stamps, etc., might be separated from the interstate commerce that was involved, and regulated by the State under either its police or its taxing power.

In *Askren v. Continental Oil Co.*²⁵ a State law was held void which sought to impose an excise tax on gasoline, and a license tax on distributors and retail dealers therein, when applied to sales in the original barrels and packages in which the gasoline was shipped into the State from another State, as well as to sales to single customers of the entire contents of tank cars.

In *Sonneborn Bros. v. Keeling*²⁶ it was held that oil transported into the State and held in warehouses for sale and delivery therefrom in the original packages, might be taxed under a State law applying without discrimination to all wholesale dealers in oil in the State; but that this tax could not be applied to sales of oil made in the State before the oil to fulfil such sales had been sent into the State, nor could the soliciting of such orders be taxed by the State. After a review of the earlier cases in which the original package doctrine had been developed and applied, the court said: "Without questioning the reasoning used to reach the conclusion in *Leisy v. Hardin*, it is enough to point out the radical difference between State legislation preventing any sale at all accompanied by forfeiture of the merchandise, and a

²⁵ 252 U. S. 444.

²⁶ 262 U. S. 506.

provision for an occupation tax applicable to all sales of such merchandise whether domestic or brought from another State. The one plainly interferes with or destroys the commerce, the other merely puts the merchandise on an equality with all other merchandise in the State and constitutes no real hindrance to introducing the merchandise into the State for sale upon the basis of equal competition." The court also distinguished the instant case from that of *Dahnke v. Walker Milling Co. v. Bondurant*²⁷ in which the State's power to tax was not involved, but rather its right—which was denied—to prevent an engagement in interstate commerce within its limits without its leave. In that case it was held that a contract for the purchase of a crop of grain to be delivered at a railway station in the State for shipment to another State was an interstate commerce contract which a corporation, not authorized to do business in the State, might nevertheless make and enforce without incurring liability under the laws of the State.

As to sales of oil, made before the oil to fulfil them had been shipped into the State, the court found no difficulty in declaring them interstate commercial transactions under the authority of *Robbins v. Shelby Taxing District*,²⁸ and many other cases applying the reasoning of that case.²⁹

In *Atlantic Coast Line R. Co. v. Standard Oil Co.*,³⁰ it was held that re-shipment of an interstate or foreign shipment does not necessarily establish a continuity of movement such as to prevent State regulation of the re-shipment. In the instant case the plaintiff maintained large tanks for storing gasoline and oils received from outside the State in which the tanks were situated, but title to such gasoline and oils did not pass to the plaintiff until these products were delivered by it to sellers within the State and settlement with such sellers made, but without any prearrangement at the time the gasoline and oils were shipped into the States as to whom the specific shipments should be sold and delivered. The movement of the gasoline and oils after reaching the storage tanks was held by the court to be intrastate commerce and, as such, subject to State regulation. The court said: "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."³¹

²⁷ 257 U. S. 282.

²⁸ 120 U. S. 489.

²⁹ Citing *Asher v. Texas* (128 U. S. 129); *Stoutenburgh v. Henneck* (129 U. S. 141); *Caldwell v. N. Carolina* (189 U. S. 622); *Rearick v. Pennsylvania* (203 U. S. 507); *Brennan v. Titusville* (153 U. S. 289); *Dozier v. Alabama* (218 U. S. 124); *Crenshaw v. Arkansas* (227 U. S. 389); *Stewart v. Michigan* (232 U. S. 665); and *Western Oil Co. v. Lipscomb* (244 U. S. 346).

³⁰ 275 U. S. 257.

³¹ See also *Kansas City Structural Steel Co. v. Arkansas* (269 U. S. 148), in which it was held that delivery of goods to a sub-contractor by one who had received the goods as an interstate shipment was intrastate in character.

In *Browning v. Waycross* (233 U. S. 16) it was held that the installation of lightning

In *Eureka Pipe Line Co. v. Hallanan* ³² it was held that oil gathered in the State by a pipe line company and transported by it was, so far as it became a part of the stream of oil passing into other States, in interstate commerce from the time it left the wells, and as such, was not subject to a State law subjecting the company to a license or occupation tax the amount of which was measured by the volume of traffic carried on by the company.

In *United Fuel Gas Co v. Hallanan* ³³ the same holding was made as to natural gas.

As to cases, which were alleged by appellants to sustain the proposition that sales of merchandise in the original packages made after being brought into the State were exempt from State taxation, the court pointed out that *Standard Oil Co. v. Graves* ³⁴ was one involving excessive inspection fees; and that, in *Askren v. Continental Oil Co.*³⁵ and *Bowman v. Continental Oil Co.*³⁶ the point involved was a substantially similar one. As to the case of *Texas Co. v. Brown*,³⁷ in which a State inspection law resulting in receipts greatly in excess of the cost of inspection, and which had been construed by the State court to be an excise tax, and held valid as to oil shipped from another State into the State and there stored for distribution and sale, the court held that the decision had been a correct one, and for the correct reason, but that the following language used by the court in the *Texas Co.* case in distinguishing it from previous cases needed to be qualified if intended to apply to oil sold after arrival in the State: "Appellant insists that *Standard Oil Co. v. Graves*, 249 U. S. 389, is inconsistent with the imposition of inspection fees on a revenue basis upon goods brought from another state, however held or disposed of in Georgia. That decision, however, extended the exemption from such fees of goods brought from State to State, no further than 'while the same are in the original receptacles or containers in which they are brought into the State' (pages 394, 395), and so it was interpreted in *Askren v. Continental Oil Co.*, 252 U. S. 444, 449."

The original package doctrine does not restrain the power of the Federal Government from extending its protection beyond the time when the package is destroyed and the goods commingled with the other goods of the State, so far as this is necessary to prevent burdens imposed by the States upon such imports by reason of their foreign origin;³⁸ or from withdrawing its protection before the breaking of the package as was done by the *Wilson Act* of August 8, 1890.³⁹

rods was not a part of the interstate commerce in such rods, although such installation was provided for in the contract of purchase of such rods.

³² 257 U. S. 265.

³⁵ 252 U. S. 444.

³³ 257 U. S. 277.

³⁶ 256 U. S. 642.

³⁴ 249 U. S. 389.

³⁷ 258 U. S. 466.

³⁸ *Welton v. Missouri* (91 U. S. 275); *Emert v. Missouri* (156 U. S. 296); *McDermott v. Wisconsin* (228 U. S. 115).

³⁹ *In re Rahe* (140 U. S. 545).

CHAPTER LVI

POWER OF THE STATES TO EXCLUDE FROM INTERSTATE COMMERCE

§ 609. Power of the States to Exclude from Interstate Commerce.

It has already appeared that the Supreme Court has never committed itself squarely to the proposition that the right to engage in interstate trade is one which owes its existence to Federal creation, express or implied, but only that, whatever its source, it is one exempt from State interference or restraint. It is clear, however, that the right does not owe its existence to express creation by the States. Hence it would seem that it is one that stands upon exactly the same common law plane as the right to hold property or to engage in any business not inherently illicit, and differs from them only in the fact that it is subject to general regulation by the Federal Government and withdrawn from regulation by the States.

It is clear that the lack of power of the State to regulate interstate commerce carries with it the disqualification to exclude persons from engaging in such commerce or to prohibit the carrying of persons or property therein, except in so far as such exclusion may be a legitimate exercise of the police power. In *Crutcher v. Kentucky*¹ was involved an act of the State requiring from the agent of a foreign express company a license, and the payment of a license fee, as a condition precedent to being permitted to carry on business within the State. The court held this law void as to parties, carrying on interstate commerce, and said: "To carry on interstate commerce is not a franchise or a privilege granted by the State: it is a right which every citizen of the United States is entitled to exercise under the Constitution of the United States." The fact that a corporation and not an individual was concerned was considered immaterial, the opinion continuing: "The accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of their right, unless Congress should see fit to interpose some contrary regulation on the subject." Furthermore, the court declared that the fact that the company was doing some local business incidental to its interstate business, which latter was its main business, did not obviate the objection that the State regulations in question restrained the company from carrying on an interstate business. "Whether intended as such or not, they operate as such." "But," the court added, "taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objections."

¹ 141 U. S. 47.

In *Pensacola Telegraph Co. v. W. U. Telegraph Co.*² an act of a State, which attempted to confer exclusive rights upon a telegraph company, was held void in so far as it was in conflict with the act of Congress of 1866, giving the right to telegraph companies "to construct, maintain and operate lines of telegraph through or over and along any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." In its opinion the court said that it is unnecessary to decide how far the States might have acted if Congress had not legislated upon the subject. The court has, however, declared in other cases that the non-action of Congress is to be deemed equivalent to a declaration that commerce among the States shall be free from State restraint.³

It is thus clear that a State may not prevent a person or a foreign corporation from entering its borders for the purpose of engaging in interstate commerce. Indeed, after referring to the doctrine of *Paul v. Virginia*,⁴ the court said: "That was not, however, the case of a corporation engaged in interstate commerce: and enough was said by the court to show that, if it had been, very different questions would have been presented."

The doctrine is generally accepted, though there are no cases in the Supreme Court directly in point, that corporations, though enjoying the Federal right to enter the various States for the purpose of carrying on an interstate commerce business therein, have not powers of eminent domain there. It may possibly be, however, that, when the point is squarely presented, the court will hold that the right may be exercised by the company when necessary and incidental to the carrying on of its interstate commerce business. This doctrine has, indeed, been definitely stated by at least one State court.⁵ And in *West v. Kansas Natural Gas Co.*⁶ the court held that a State might not, as a means of preventing the transportation of natural gas outside the State, refuse to permit the construction of pipe lines except by domestic companies, which companies should have the exclusive right of eminent domain, and the right of use of the public highways. In its opinion the court quoted with approval the statement of the Circuit Court of Appeals in *Haskell v. Corwin*⁷ that: "No State,

² 96 U. S. 1

³ "The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman v. Chicago, etc., Ry. Co.* (125 U. S. 465). For similar statements see *Leisy v. Hardin* (135 U. S. 100) and *West v. Kansas Natural Gas Co.* (221 U. S. 229).

⁴ 8 Wall. 169.

⁵ *W. U. Tel. Co. v. Superior Court* (115 Pac. 1091) (Cal. Dist. Ct. of App. 1911), cited by Cooke in his article, "The Right to Engage in Interstate Transportation," 21 *Yale Law Journal*, 210.

⁶ 221 U. S. 229.

⁷ 187 Fed. 403.

by the exercise of or by refusal to exercise, any or all of its powers, may prevent or unnecessarily burden interstate commerce within its borders in any sound article thereof. No State, by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

This *Natural Gas Co.* case is, then, authority for the doctrine that a State cannot refuse the right of eminent domain to a corporation, foreign or domestic, or to an individual, when employed for the purpose of carrying on interstate commerce, if the right is given to similar corporations or individuals engaged in domestic commerce, and possibly, indeed, for the broader doctrine that in no case may a State deny to a foreign corporation a power or right the exercise of which is incidentally necessary or, perhaps only convenient or expedient, for the carrying on of an interstate commerce business.

Thus far we have been speaking of the lack of power of the States to prevent individuals or corporations from entering or carrying on interstate or foreign commerce within their respective territories. Turning now to their power to prevent specific commodities from being brought across their borders, it is found that exclusion may be constitutionally justified only when reasonably necessary as a police measure, that is, where the excluded commodities are, in themselves, not merchantable or such as may not be safely transported.

In *Bowman v. Ry. Co.*⁸ the court said: "Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution."

This power of exclusion by the States may not be exercised by the States with reference to articles as a class, unless as an entire class, they are intrinsically unfit for commerce and not merchantable. In all other cases their unfitness for commerce must be determined by inspection and upon reasonable grounds. In the *Bowman* case the court said: "It has never been regarded within the legitimate scope of inspection laws to forbid

⁸ 125 U. S. 465.

trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse."

In no case may the States exclude from their borders or interfere with the importation of such articles as have directly or impliedly been recognized by Congress as legitimate articles of interstate commerce. And, furthermore, it is an established principle that, as to articles legitimately the subjects of commerce, the silence of Congress as to them is to be construed as equivalent to a declaration that interstate trade as to them is to be unrestricted.⁹

These principles have been excellently illustrated with reference to State liquor and oleomargarine laws.

§ 610. Oleomargarine.

In *People v. Marx*,¹⁰ the New York court held void an act which prohibited the manufacture of any substitute for butter whether or not it was in imitation thereof. The court said: "Who will have the temerity to say that these constitutional provisions [relating to due process of law] are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race." However, in *Powell v. Pennsylvania*,¹¹ the Supreme Court upheld, as a legitimate police measure for the prevention of fraud, a State law which prohibited the manufacture of oleomargarine or of any other substance not manufactured from pure milk and cream which was intended for use as butter. The court said: "Whether the manufacture of oleomargarine or imitation butter, if of the kind described in the statute, is, or may be, conducted in such a way or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require for the protection of the people the entire suppression of the business rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine."¹²

In *Plumley v. Massachusetts*,¹³ the court again upheld a drastic State law regulating the manufacture and sale of articles simulating butter, as being in violation neither of the Fourteenth Amendment, nor of the Commerce Clause, even when applied to such articles brought from other States. The validity of the law was sustained as a legitimate police provision against fraud, the court as to this saying: "It will be observed that the statute of Massachusetts . . . does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter pro-

⁹ *Leisy v. Hardin* (135 U. S. 100).

¹⁰ 99 N. Y. 386.

¹¹ 127 U. S. 678.

¹² Justice Field dissented in a strong opinion.

¹³ 155 U. S. 461.

duced from pure unadulterated milk or cream of such milk. . . . The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food . . . can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand recognition of the right to practise a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?" ¹⁴

In *Collins v. New Hampshire* ¹⁵ it was held that a State could not require that an article of interstate commerce be rendered unsalable, as, for example, by compelling artificial butter to be colored pink, any more than it could prevent its importation.

In *Schollenberger v. Pennsylvania*, ¹⁶ the court when asked to enforce a State oleomargarine law with reference to the importation and sale in the original package of oleomargarine manufactured in another State, held the law void so far as its application to interstate and foreign commerce was concerned. Oleomargarine, the court held, had been recognized by the Federal Government as a proper subject of interstate commerce, and it was, therefore, beyond the competence of the States whether in the exercise of their police or other powers, to place restrictions upon its importation or exportation. The court, after a review of earlier cases, said: "The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion of an article of food."

§ 611. State Exclusion of Intoxicating Liquors from Importation.

The extent to which the States may, for the effective enforcement of their respective public policies, prevent the importation from other or foreign States of intoxicating liquors has been elsewhere discussed.¹⁷ It may, however, be here observed that, as distinguished from the manufacture of oleomargarine or other industries, it has been recognized by the courts that the business of manufacturing and selling of intoxicating liquors is one which, by reason of its essential character, is subject to police regulation, and that, therefore, one who enters upon it, knows that it is subject to drastic regulation or even prohibition.¹⁸

¹⁴ The case was distinguished from liquor cases on the ground that in those cases no element of fraud was involved.

¹⁵ 171 U. S. 30.

¹⁶ 171 U. S. 1.

¹⁷ See § 598.

¹⁸ As to this see *Mugler v. Kansas* (123 U. S. 623).

§ 612. Power of the States to Exclude from Exportation Their Natural Resources, such as Natural Gas, Oil, etc.

In *Geer v. Connecticut*,¹⁹ as has earlier appeared,²⁰ it was held that a State might prohibit the transportation out of the State of wild animals killed within the State. This was upon the ground that, until reduced to private possession, the ownership of *feræ naturæ*, so far as they are capable of ownership, is in the State and the State, in its sovereign capacity, if not as proprietor, is entitled to conserve them for the benefit of its people. The State, therefore, has the right to determine under what conditions and for what purposes wild game may be reduced to private possession and ownership. "The sole consequence of the provision forbidding the transportation of game killed within the State, beyond the State," said the court, "is to confine the use of such game to those who own it, the people of that State. . . . The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. . . . Granting that the dealing in game killed within the State, under the provision in question, created internal State commerce, it does not follow that such internal commerce became necessarily the subject matter of interstate commerce, and therefore under the control of the Constitution of the United States."

In *Hudson County Water Co. v. McCarter*²¹ it was held that a State, under its police power, might prevent riparian owners from diverting the waters of a stream of the State into another State for use therein. This case involved no question of interstate commerce, but is mentioned because of its relation to the general rights of the States with reference to the conservation of their natural resources. The objection which had been raised to the law in question was based upon the due process of law and equal protection of the laws clauses of the Fourteenth Amendment.

In *West v. Kansas Natural Gas Co.*²² it was held that natural gas, when reduced to possession, is the property of the owner of the land from which it issues, and may be the subject of both intrastate and interstate commerce. As such, it was held that a State statute was unconstitutional, as an interference with interstate commerce, which prohibited the construction of pipe lines or the transportation of the gas by such lines except by domestic corporations whose charters should provide that the gas should not be transported to, or delivered to, any person or corporation engaged in transporting or furnishing gas to points outside of the State. In order to distinguish the situation with regard to such commodities as natural gas and oil from animals *feræ naturæ*, the court pointed out in that as to *feræ naturæ*, all persons have the power to reduce them to possession, whereas in the case of gas,

¹⁹ 161 U. S. 519. See also *Foster-Fountain Packing Co. v. Haydel*, decided October 15, 1928.

²⁰ *Ante*, § 604.

²¹ 209 U. S. 349.

²² 221 U. S. 229.

oil, timber, minerals, etc., this is limited to the proprietors of the surface lands from which they are taken. Quoting from *Ohio Oil Co. v. Indiana*,²³ the court said: "In the one, as the public are the owners, everyone may be absolutely prevented from seeking to reduce to possession. No divesting of private property, under such a condition, can be conceived, because the public are the owners, and the enactment by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the State as to property of that character. *Geer v. Connecticut*, 161 U. S. 519. On the other hand, as to gas and oil, the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property." And this right, it was further said, was coequal in all of the owners of the surface, and that the power of the State could be exerted "for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste."

The court then went on to point out that the State statute in question did not seek to conserve the supplies of gas by protecting the rights of all surface owners against the abuses of any, but only to control the distribution of the gas which was the property of the surface owners. "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out."

In *Pennsylvania v. West Virginia* and *Ohio v. West Virginia*,²⁴ decided in 1923, and sometimes known as the "Natural Gas Case," the court held void, as an unconstitutional interference with interstate commerce, a law of the State of West Virginia which, with intent of conserving to her own citizens the supply in the State of natural gas which, it was believed, was being exhausted, or, at any rate would not be able to supply the en-

²³ 177 U. S. 190.

²⁴ 262 U. S. 535.

tire demand of other States to which it was being piped as well as the demands of its own citizens, provided that every person engaged in supplying natural gas for the use of the public should, to the extent of his supply, furnish gas for all purposes for which it might be desired by the people of the State, and that the Public Service Commission of the State should have the necessary authority to compel the establishment of reasonable pipes or other conduits for the purpose. The court held that this law, taken in connection with the circumstances surrounding it, would, if enforced, necessarily operate to compel the diversion to local consumers of a large part of the gas which at the time was going, and which previously had gone to consumers in the complainant States, and, therefore, would work a serious interference with that interstate commerce. The contention on behalf of the State of West Virginia that the law was justified as a reasonable measure for conserving a natural resource the court held to have been answered by the case of *West v. Kansas Natural Gas Co.*^{24a}

In *People's Natural Gas Co. v. Public Service Commission of Pennsylvania*,²⁵ it was held that natural gas moving continuously in pipe lines between States is in interstate commerce throughout such movement, even though title to it may change at State boundaries; but that gas produced in a State and supplied by pipe lines to consumers within the State is in intrastate commerce although commingled with a definitely known quantity of gas moving in interstate commerce.

It is clear, then, that, though the commerce clause places no restriction upon the constitutional power of the States to regulate or even prohibit the manufacture within their limits of specific commodities, they cannot base their permission to manufacture or produce upon the condition that the commodities manufactured or produced shall not be sold or shipped outside of the State. Such a condition amounts not only to a limitation upon, but a discrimination against, interstate commerce.

§ 613. Charter Provisions.

The State which grants a charter of incorporation to a company may, as a condition precedent to the grant, stipulate that the company shall pay into the State's treasury a certain percentage of its receipts, or be liable to a certain tax on the amount of its capital stock, or to a special property tax, and the fact that these receipts are derived from its interstate commerce business, or that its property is so employed does not render the stipulation void. The sums so paid are not paid because of the interstate commerce done, but as a payment to the State for the charter which it

^{24a} Of this case Ex-Justice Hughes says that it is probably the most argued case on record,—“a case which was thrice argued, then decided and the decision followed by a rehearing; then three judges dissented from the final decision.” *The Supreme Court of the United States*, p. 72.

²⁵ 270 U. S. 550.

has obtained, and which the State could grant or withhold as it might see fit.²⁶

But a State may not in a charter which it grants reserve to itself a right to regulate the interstate commerce business of a corporation, for it does not lie within the power of a State thus by its own act to obtain an authority over matters vested exclusively in the Federal Government.²⁷

A State, when granting a charter of incorporation, may determine what manufacturing a corporation may engage in, and thus prevent it from manufacturing any but specific commodities: but the power to manufacture being granted, it may not, by charter provision or otherwise, prevent, or, except as required by reasonable police precautions, in any way restrain the shipment and sale of the manufactured commodities outside of the State. So, similarly, with reference to carrier companies, the State of incorporation may grant or refuse to a carrier company a right to do business as a corporation, but, the right once granted, it may not prevent the corporation from doing an interstate carrier business.

Since the decision of *Paul v. Virginia*,²⁸ there has been no doubt that, generally speaking, the States have a free discretion to determine whether or not a foreign corporation shall be permitted to do a domestic, that is, an intrastate, business, within their several limits. Predicated upon this right some States have attempted to control such corporations in the exercise of their Federal rights, by making the continuance of the right to do a domestic business contingent upon the non-exercise by the corporations concerned of certain of their Federal rights. This has been attempted especially with reference to their Federal right of removing into Federal courts, on the ground of diversity of citizenship, suits instituted against them by citizens of the States where they are doing business. The principles with reference to this effort on the part of the States to control the exercise of distinctively Federal rights, have been earlier discussed,²⁹ and it is only necessary to say here that they can be applied should the States seek, in a similar manner, to control the right to engage in interstate commerce.³⁰

²⁶ *Railroad v. Maryland* (21 Wall. 456).

²⁷ *Louisville R. R. Co. v. Railroad Com. of Tenn.* (19 Fed. Rep. 679).

²⁸ 8 Wall. 168.

²⁹ See § 161.

³⁰ See, for example, *Western Union Tel. Co. v. Kansas* (216 U. S. 1), in which a State sought to require the payment by a foreign telegraph company, doing both an interstate and a local business of a given per cent of entire authorized capital stock as a condition precedent to being allowed to do a local business in the State. This case is all the stronger in that it was rendered prior to the overruling of the holding of the court in *Security Mutual Life Ins. Co. v. Prewitt* (202 U. S. 246). See also *Pullman Co. v. Kansas* (216 U. S. 56); *Ludwig v. W. U. Tel. Co.* (216 U. S. 146). But see *Baltic Mining Co. v. Massachusetts* (216 U. S. 1), in which a State tax was upheld with reference to a company which could do and was doing a purely local and domestic business separate from its interstate business.

CHAPTER LVII

EXCLUSION FROM FOREIGN COMMERCE

§ 614. Exclusion from Foreign Commerce.

In what has gone before reference has been had to the constitutional incompetency of the States with respect to exclusion from interstate commerce. There has never been any doubt that an equal incompetency exists with respect to foreign commerce. Indeed, so far as these two fields of commerce are concerned, the immunity of foreign commerce from State restraint and regulation has always been held more obvious, if not more absolute, than that of interstate commerce. Thus in *Crutcher v. Kentucky*¹ the court declared, as though it were not open to argument: "Would any one pretend that a State legislature could prohibit a foreign corporation—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage without first obtaining a license from some State officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently, because the matter is not within the province of State legislation, but within that of national legislation." ²

In *The Abby Dredge*,³ declaring the constitutional right of Congress to prohibit, as it has done by the act of June 20, 1906,⁴ the landing at any port or place in the United States of sponges taken outside of State territorial waters, the court said: "Practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United States."⁵ Indeed, as pointed out in the *Buttfield* case, so completely is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."

See, also, in *Weber v. Freed*,⁶ in which was sustained the constitutionality of the act of Congress of July 31, 1912,⁷ making it unlawful to bring or

¹ 141 U. S. 47.

² Citing *Inman S. S. Co. v. Tinker* (94 U. S. 238).

³ 223 U. S. 166.

⁴ 34 Stat. at L. 313.

⁵ *Buttfield v. Stranahan* (192 U. S. 470) and authorities there collected.

⁶ 239 U. S. 325.

⁷ 37 Stat. at L. 240.

cause to be brought into the United States films or other pictorial representations of prize fights for purposes of public exhibition. The court said that the contention that Congress, by such prohibition, had exceeded its constitutional powers over foreign commerce was so devoid of merit as to be frivolous.

CHAPTER LVIII

INTRASTATE RATE REGULATION BY THE STATES IN ITS RELATION TO INTERSTATE COMMERCE

§ 615. Intrastate Rates.

The constitutional right of the States to regulate the rates and other charges to be made for the rendition of intrastate carrier services, has not, as a general proposition, been contested. Viewed thus as a general or original proposition, the power of the States in the premises is the same as that of the Federal Government with reference to interstate and foreign trade. Difficulty has, however, arisen with reference to the application of these two powers by reason of the fact that, though distinct from each other, the exercise of the one power within the States necessarily produces, in many cases, an effect within the field of interstate commerce, and vice versa. With regard to the problems thus arising with regard to the regulations of rates which necessarily, as a matter of fact, affect both interstate and intrastate trade, it will be found that the principles of constitutional law, as expressed in the decisions of the courts as well as in the policies of Congress as expressed in its statutes, have shown a steady progress toward the doctrine that whenever the rates charged for intrastate traffic affect in any way, even though only incidentally, the rates chargeable for interstate traffic, the Federal Government may, to the extent that may be necessary, prevent that interference by itself controlling intrastate rates. The same doctrine has been applied to all forms of interstate commerce regulation, but it is with reference to rate regulation that the doctrine has been most carefully worked out.

In the Granger cases, decided in 1876, the Supreme Court recognized the right of the States to fix rates of carrier companies not only for intrastate transportation, but even, incidentally or indirectly, for the portions of interstate transportation within their several limits, provided Congress had not acted in the premises. Thus, in *Peik v. Chicago and N. W. R.*¹ the court said: "Until Congress acts with reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. . . . Incidentally these may reach beyond the State. But certainly, until Congress undertakes to legislate for those which are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without it."

¹ 94 U. S. 164.

However, in *Wabash, St. L. & P. R. Co. v. Illinois*,² there was a stiffening of the court's view with regard to the right of the States to control, even indirectly and incidentally, interstate rates. In that case the court said that it could uphold the State law only as applied to contracts for carriage beginning and ending within the State, and disconnected with a continuous carriage through or into other States. After reviewing the earlier cases, the court said: "We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges of railway companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law."

In *Covington & Cincinnati Bridge Co. v. Kentucky*³ the question was again carefully examined, and the doctrine of the *Wabash* case affirmed. "To that doctrine," the court declared, "we still adhere." In this bridge case it was held that a State was without the power to regulate tolls upon a bridge connecting the State with another State.⁴

In still further limitation of the power of the States to regulate domestic rates of public service corporations, was the doctrine declared in *Smyth v. Ames*⁵ that a State, in determining whether a proposed rate will leave a reasonable net profit to the company, may not take into consideration the entire business of the company if some of that business is interstate in character. In that case the justice rendering the decision said: "In my judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line

² 118 U. S. 557.

³ 154 U. S. 204.

⁴ But see § 595, with reference to ferries for a later explanation of the doctrine of this *Covington* case.

⁵ 169 U. S. 466.

is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State,—can have no application where the State is without authority over rates on the entire line, and can only deal with local rates, and make such regulations as are necessary to give just compensation on local business.”

§ 616. Minnesota Rate Cases.

In the Minnesota Rate cases—*Simpson v. Shepard*⁶—the court took a decided step forward in the matter of subordinating the rate-fixing powers of the States with reference to intrastate commerce to those of the Federal Government with reference to interstate commerce when it declared that a State may not fix intrastate rates so low that a carrier’s entire revenue from all its business in the State, interstate as well as intrastate, will not yield a fair net return upon the property employed by the carrier in doing such business.

The Minnesota Rate cases were suits brought by stockholders of several railways to restrain the enforcement of certain orders of the Railroad and Warehouse Commission of the State of Minnesota and of two acts of the legislature of that State prescribing maximum charges for transportation of freight and passengers, and to prevent the adoption and maintenance of these rates by the railroad companies. These orders and acts related wholly to intrastate transportation, but it was alleged that they operated as a direct burden upon interstate commerce and also that they were in conflict with existing Federal legislation. It was also charged that the rates fixed were confiscatory in character, but with this point we are not in this chapter concerned. Appreciating the importance of the questions involved, the railway commissions of eight States and the Governors of three States (acting in pursuance of a resolution of a conference of Governors of all the States) filed briefs in the cases as *amici curiæ*.

The contention that the State orders and acts operated to place a direct burden upon interstate commerce, the court, after an exhaustive review of the facts as found in the court below, found to be without a substantial basis. Had there been this direct burdening of interstate commerce, the orders and acts would of course have been held invalid; but, holding that there was not this direct interference with interstate traffic, the court found it necessary to determine whether they were in conflict with existing congressional legislation, and, in order to determine this, it became necessary to consider the extent to which Congress, by its legislation, had intended incidentally and indirectly to regulate intrastate commerce, and its constitutional power so to do. The court said that, by the act of 1887 and the amendments thereto, Congress had not attempted a direct regulation of in-

⁶ 230 U. S. 352.

trastate rates, and, the court added, it could not be supposed that Congress sought to do by indirection what it had not attempted to do directly. The right to prescribe intrastate rates remained, therefore, with the States. Speaking generally with regard to the constitutional relation between the fixing of interstate rates and the prescribing by the State of intrastate rates, the court said: "If a State enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free. On the other hand, if the State, in the absence of Federal regulation, would have the power to prescribe the rates here assailed, the question remains whether its action is void as repugnant to the statute which Congress has enacted."

The recognition of the existence of this last possibility, as indicated in the language which has been quoted, marked the significance of the position assumed by the court in the Minnesota Rate cases. It indicated, in other words, that Congress might constitutionally so legislate with reference to interstate rates as, in large measure, to prevent the States from legislating with regard to intrastate traffic, whether with reference to the prescribing of rates or otherwise. The court said: "There is no room in our scheme of government for the assertion of State power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. . . .

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting State legislation."

In a sense, the foregoing statements were *obiter*, inasmuch as, in the instant case, the States were found to have acted within their constitutional competences, but, none the less, a clear indication was given as to what would be the holding of the court in case State regulations of intrastate rates were found to be in conflict with a congressional policy with reference to the regulation of interstate commerce.

It is to be noted that, by necessary implication, the court, in the Minnesota Rate cases, as it had held in earlier cases, declared that it was possible, in many cases, to separate intrastate from interstate rate regulation. To the contention that, because of the interblending of operations in the conduct of interstate and intrastate railway business, this was not possible, the court said: "It is urged that the same right of way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day which will hold to-morrow; that terminals, facilities, and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and can not be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just which does not take into consideration the whole field of the carrier's operations, irrespective of State lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates can not be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."

§ 617. Shreveport Rate Case.

In *Houston, E. & W. Texas R. Co. v. United States*⁷ the court again showed the superiority of the Federal rate-making authority with reference to interstate commerce over that of the States with reference to intrastate commerce. In this case, known as the Shreveport case, the court upheld an order of the Interstate Commerce Commission which had directed that intrastate rates maintained by a carrier under State authority should be changed to the extent necessary in order to prevent a result which, in the opinion of the Commission, operated as an unjust discrimination against interstate commerce. The charge was that the carriers had made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they had made into Texas from Shreveport, Louisiana, a competing point. The court after pointing out that Congress had the power, acting directly or through the Commission, to prevent unreasonable discriminations against interstate traffic, said: "It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of State authority alter the matter, where Congress has acted, for a State cannot authorize the carrier to do that which Congress is entitled to forbid and has forbidden."

The court then went on to say that, in order to meet discriminations created by intrastate rates, Congress is not bound to reduce interstate rates below what it may deem to be proper. "Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

§ 618. Later Cases.

In *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*⁸ it was held that, under Section 416 of the Transportation Act of 1920, the Interstate Commerce Commission was not authorized in order to remove discriminations against persons and localities to issue an order directing a horizontal increase in all intrastate passenger rates throughout a State, in order to meet discriminations against interstate commerce in typical instances, where the effect would be to include intrastate rates which were not thus discriminatory; but that the order was justified in order to remove discrimination against interstate commerce as a whole and to make it possible to provide the public with adequate railway service, as provided

⁷ 234 U. S. 342.

⁸ 257 U. S. 563.

for in the Transportation Act of 1920. After discussing the general purposes of that act, and showing that it represented a new departure in Federal railway legislation in that its principal purpose was to promote the public welfare in matters of transportation, by maintaining an adequate national railway system, rather than to benefit the railways, the court said: "If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should bear a fair proportionate share of the cost of maintaining an adequate railway system. . . . If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce' within the ordinary meaning of these words." And, generally, as to the necessity and reasonableness of controlling intrastate rates to the extent necessary in order, as a practical proposition, to control interstate rates, the court said: "Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit, and does not regard State lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce such incidental regulation is not an invasion of State authority or a violation of the proviso. . . . It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce."

In *Texas v. Eastern Texas R. Co.*⁹ it was held that, under Section 402 of the Transportation Act of 1920, the Interstate Commerce Commission was not authorized to sanction the discontinuance of the purely intrastate business of a railroad lying wholly within a single State, and used and operated by a corporation of that State and not as a part of any other line. It was pointed out by the court that interstate or foreign commerce would not be burdened or affected by any shortage in the earnings of the road. The provisions of the Transportation Act involved, the court declared, were to be construed in connection with those of the Interstate Commerce Act, which act was amended by those of the Transportation Act.

In *Chicago, M. & St. P. R. Co. v. Public Utilities Commission*¹⁰ it was held that a public utilities commission of a State could not justify a con-

⁹ 264 U. S. 79.

¹⁰ 274 U. S. 344.

fiscatory rate upon an intrastate traffic upon the ground that it was a part of interstate traffic, and that there had been showing by the carriers as to the gains or losses resulting from the interstate traffic.

In *Lancaster v. McCarthy*¹¹ it was held that the Federal commercial power in its effect to overrule regulations of intrastate commerce by the States includes the classification of rates as well as the specific rates themselves.

In *United States v. Village of Hubbard*¹² the doctrine of *Shreveport* case was applied to interurban electric railroads.

In *Colorado v. United States*¹³ it was held that interstate commerce was unconstitutionally interfered with by a State regulation which required a railroad to operate, even at a loss, a branch of its line within the State, it appearing that the loss thus entailed was a burden upon the interstate operation of the road. The court said: "Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

. . . The exercise of Federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its Federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission v. Eastern Texas R. Co.*, 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York v. United States*, 257 U. S. 591."

§ 619. Rate Regulation and the War Power.

By the act of August 29, 1916,¹⁴ Congress gave authority to the President, in time of war, through the Secretary of War, "to take possession

¹¹ 267 U. S. 427.

¹² 266 U. S. 474.

¹³ 271 U. S. 53.

¹⁴ 39 Stat. at L. 645.

and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

On December 26, 1917, the President, by proclamation, in exercise of the authority thus vested in him, took possession of all the systems of general railway transportation in the United States and their appurtenances in order that they might be operated by the Federal Government.

On March 21, 1918, Congress enacted a law ¹⁵ making provision as to the manner in which the roads should be operated and as to the just compensation to be paid to their owners.

On May 25, 1918, the Director General of Railroads, to whom had been given the general control of the operation of the roads while under Federal control, issued an order establishing a schedule of rates for all the roads under his authority, and covering all classes of services, intrastate as well as interstate.

In *Northern Pacific R. Co. v. State of North Dakota* ¹⁶ a bill had been filed by the Utilities Commission of the State for mandamus against the Director General and the officers of the railway company, asserting the want of Federal power over intrastate rates. The court, passing upon this contention, and upholding the authority of the United States, referred to the provision of the statute of 1918 expressly giving to the President the power to fix rates, and, as to the constitutionality of this congressional grant, said: "On the face of the statutes it is manifest that they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a State power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used. *Cox v. Wood*, 247 U. S. 3.

"The elementary principle that under the Constitution the authority of the government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises

¹⁵ 40 Stat. at L. 451.

¹⁶ 250 U. S. 135.

the State power is limited, since in case of conflict *that which is paramount necessarily controls that which is subordinate.*"

It would appear, then, that when Congress is exercising its war powers, as distinguished from those derived from the Commerce Clause, the constitutional distinction between interstate and intrastate regulation disappears.

CHAPTER LIX

THE STATES AND FOREIGN CORPORATIONS ENGAGED IN INTERSTATE AND FOREIGN COMMERCE

§ 620. The States and Foreign Corporations Doing an Interstate and Foreign Commerce Business.

As has earlier appeared, the right to engage in interstate commerce, even if not of Federal creation, is one which is protected by the Constitution against State interference or control. As the court said in *Vance v. Vandercook*,¹ the right of the individual to import is "derived from the Constitution of the United States, and does not rest on the grant of the State law;" and, as declared in *Delameter v. South Dakota*,² no State can render illegal or in any way restrain the making of contracts by its residents with reference to interstate commerce.

That a corporation is not considered a "citizen" within the meaning of the provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States, has not been questioned since *Paul v. Virginia*.³ The privileges and immunities referred to in that clause are those which are common to the citizens under their Constitution and laws by virtue of their being citizens, and are not those special privileges which may be granted them and which are valid only within the State creating them. "A grant of corporate existence," the court said: "is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created."

But though not a citizen within the interstate comity clause, the corporation is a person within the "due process clauses" of the Constitution and possesses all the other Federal privileges and immunities, which can attach to an artificial person, and among these is the right to engage in interstate commerce. "If," said the court in *Crutcher v. Kentucky*,⁴ "a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislature to exact conditions on which they should carry on their business, nor require them to take out a license therefor. To carry on interstate commerce is not a franchise or privilege granted by the

¹ 170 U. S. 438.

² 205 U. S. 93.

³ 8 Wall. 168.

⁴ 141 U. S. 47.

State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."⁵

In *Pensacola Telegraph Co. v. Western Union Telegraph Co.*⁶ it was established that a company chartered by the United States to do an interstate commerce business could not be prevented by a State from carrying on that business within its borders. With reference to the case of *Paul v. Virginia* the court observed that the corporation there involved was not engaged in interstate commerce and "enough was said by the court to show that if it had been, a very different question would have been presented."⁷

A State, though not able to exclude from its borders a Federally chartered corporation engaged in interstate commerce, is possibly not compelled to aid that corporation by granting to it any special privileges, such as the right of eminent domain. Congress may, however, endow such a corporation with the right of eminent domain, which right it may exercise within the States without their consent or against their will.⁸

In *Pembina C. S. M. & R. Co. v. Pennsylvania*⁹ a State law was upheld as to a foreign mining and milling corporation which assessed a license tax upon its offices in the State but which imposed no prohibition upon the transportation into the State of its products, or upon their sale within the State. However, in *McCall v. California*,¹⁰ a State law was held invalid, as an interference with interstate commerce, which sought to impose a license tax upon an agent of an interstate railway company whose exclusive duty it was to solicit interstate passenger traffic over the road.

§ 621. What Constitutes "Doing Business" in the State.

It is often a very difficult matter to determine when a foreign corporation may be said to be "doing business" within the State, as a corporation, or simply engaged in individual, isolated, interstate commercial transactions in the State. The courts have not been able to lay down any general rule for determining this question, but have been compelled to

⁵ In these respects the court went on to say, the States have no more authority than they have over corporations chartered in foreign countries, and engaged in landing goods or passengers in American ports, or soliciting business here.

⁶ 96 U. S. 1.

⁷ It may be said, generally, that a State cannot exclude a corporation in the employ of, or performing services for the Federal Government. *Pembina Co. v. Penn.* (125 U. S. 181); *Postal Tel. Co. v. Adams* (155 U. S. 688).

⁸ Whether this right may be exercised with reference to land owned or already devoted to a public use by the State, is another question.

⁹ 125 U. S. 181.

¹⁰ 136 U. S. 104.

decide each case upon its own merits or facts. In *International Harvester Co. v. Kentucky*¹¹ it was held that the continuous solicitation of orders through local agents, which orders were sent to another State to be filled and the articles ordered to be delivered within the State (the agents having authority to receive payments therefor) amounted to doing business in the State by a foreign corporation to the extent of authorizing the service of judicial process upon the corporation by service upon such agents, and that the corporation was not, by reason of being exclusively engaged in the State in interstate commerce, immune from service of process under the laws of the State. In *Green v. Chicago, B. & Q. R. Co.*¹² it had been held that a railway company was not "doing business" in the State, when, having its organization and tracks in another State, and, as incidental and collateral to its business proper, it solicited freight and passenger traffic in the State in question and employed an official for that purpose who had an office within the State. In its opinion in the *International Harvester* case the court pointed out that the case of *Green v. Chicago, B. & Q. R. Co.* was "an extreme case," and that the business shown therein as carried on by the railway company was in substance nothing more than solicitation. "In the case now under consideration," said the court, "there was something more than mere solicitation. In response to the orders received, there was a continuous course of shipment of machines into Kentucky. There was authority to receive payment in money, check, or draft, and to take notes payable at banks in Kentucky." This is true, but an examination of all the facts in the two cases shows that the cases were distinguishable by no clear logical line. The difference was, after all, nothing more than one of degree.

A corporation which transacts its business in a foreign State through a subsidiary company which it completely dominates, is not deemed to be doing business within that foreign State so as to render it subject to suit therein, where the subsidiary company does not act as its agent but buys the products of the foreign company, sells them to its customers, and keeps all transactions and accounts wholly separate from those of the foreign corporation.¹³

A corporation whose activities in a State do not extend beyond maintaining a local office from which it distributes dividends, elects officers, holds directors' meetings, and authorizes deeds to lands outside the State, cannot be said to be "doing business" in the State.¹⁴

¹¹ 234 U. S. 579.

¹² 205 U. S. 503.

¹³ *Cannon Mfg. Co. v. Cudahy Pkg. Co.* (267 U. S. 333).

¹⁴ *Cheney Bros. Co. v. Massachusetts* (246 U. S. 147).

CHAPTER LX

STATE TAXATION AND INTERSTATE COMMERCE

§ 622. Interstate Commerce May Not Be Taxed.

It has already been shown that the States are permitted, in the exercise of the powers reserved to them, substantially to affect interstate and foreign commerce, so long as this interference is an indirect, incidental one, the legislation in question a legitimate and *bona fide* exercise of a reserved power, and not in contravention to any existing Federal statute or regulation. This principle holds true with reference to the taxing powers of the States. A direct taxation of interstate or foreign commerce, that is, of the goods carried as exports or imports, of the agencies and instrumentalities of such commerce as such, or of the act of carrying on, or the right to engage in or to carry on, interstate and foreign commerce, is always construed as a direct regulation of, or interference with, such commerce, and, as such, beyond the power of the States.

A State cannot even enforce the collection of a valid tax by an injunction restraining a person or corporation from doing interstate commercial business.¹

In *Osborne v. Mobile* ² the court sustained a State tax which bore directly upon interstate commerce companies as such. The law in question in this case required every express or railroad company doing business in the city of Mobile and having a business extending beyond the limits of the State to pay a certain annual license fee. The court sustained the provision on the ground that there was no discrimination between the citizens of the State and the citizens of other States. However, in *Moran v. New Orleans* ³ this position was practically departed from, and, in *Leloup v. Mobile*,⁴ the doctrine was absolutely and explicitly repudiated that any State tax however indiscriminative, however light, or whatever its other features, can be valid which imposes a direct burden upon persons or corporations engaged in interstate commerce, or because of their being so engaged. The court, after a review of authorities, said: "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business

¹ *Western Union Telegraph Co. v. Massachusetts* (125 U. S. 530); *Sprout v. City of South Bend* (277 U. S. 163).

² 16 Wall. 479.

³ 112 U. S. 69.

⁴ 127 U. S. 640.

of carrying it on, and the reason is that such taxation is a burden on that commerce, and demands a regulation of it, which belongs solely to Congress."

A State tax on wholesale and retail dealers the amount of which is based upon the volume of business was held in *Crew Levick Co. v. Pennsylvania*⁵ to be an unconstitutional burden upon interstate and foreign commerce in so far as it was measured by the gross receipts from goods shipped out of the State or orders taken outside the State and sent direct to the dealer. That the law applied to internal as well as to foreign commerce, it was held, would not save it.⁶ "That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."

In *Foote v. Stanley*⁷ it was held that interstate commerce was unconstitutionally burdened by a State tax, termed an inspection charge, levying one cent a bushel upon oysters coming into the State since the receipts from it would be largely in excess of the amount required to pay the salaries of inspectors.

In *Wagner v. City of Covington*⁸ the court laid down the general doctrine that, in the testing the constitutional character of a State tax law, the court would not hold itself bound by the definition of the tax as declared by the State, but would be guided by its practical operation and effect as applied and enforced. In this case a State license tax was held illegal which was upon the business of itinerant venders of goods as carried on in the State and applicable alike to all such dealers irrespective of where the goods were manufactured and without discrimination against goods manufactured in other States.

In *Air-Way Electric Appliance Corporation v. Day*⁹ State franchise fees were held void, as applied to a foreign corporation doing interstate business, the amount of which was based on a charge on non-par common stock representing the corporation's property and business outside the State as well as on shares representing property and business within the State.¹⁰ The court, in the course of its opinion, declared firmly established the doctrine that "A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a

⁵ 245 U. S. 292.

⁶ Citing *State Freight Tax* case (15 Wall. 232).

⁷ 232 U. S. 494. See also *Northwestern M. L. Ins. Co. v. Wisconsin* (275 U. S. 136).

⁸ 251 U. S. 95.

⁹ 266 U. S. 71.

¹⁰ The law was also held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment, the classification provided for by it having no relation to its purpose. Franchise fees, it was declared, must have some relation to the value of the privilege for which they are imposed.

charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States, and this because the capital stock of the corporation represents all its business of every class and all its property wherever located."

In *Hope Natural Gas Co. v. Hall*¹¹ it was held that interstate commerce was not unconstitutionally burdened by a State tax on producers of natural gas reckoned according to the value of the gas at the well, and before it had entered into interstate commerce.¹²

In *Ozark Pipe Line Corporation v. Monier*,¹³ a law of the State of Missouri was involved which imposed an annual franchise tax on corporations not organized under the laws of the State but doing business therein, equal to one per cent of the par value of their capital stock and surplus employed in business in the State, and, which, for the purposes of the tax, deemed a corporation to have thus employed in the State "that proportion of its entire capital stock and surplus that its property and assets in this State bears to all its property and assets wherever located." This law was held invalid as to a foreign corporation engaged exclusively in the operation of a pipe line from Oklahoma, through Missouri, to a point in Illinois, although it maintained an office, purchased supplies, employed labor, and maintained and operated telephone and telegraph lines, etc., within the State. The court, in its opinion, pointed out that decisions upon the point at issue depended upon questions of practical fact as to whether or not the local business could be separated from interstate business of the concerns sought to be taxed. *New York ex rel. Pennsylvania R. Co. v. Knight*,¹⁴ was an instance in which this separation could be made, and, therefore, the tax had been upheld; *Norfolk, etc., R. Co. v. Pennsylvania*¹⁵ and *Heyman v. Hayes*,¹⁶ on the other hand, were instances in which the separation could not be made, and, therefore, the tax had been held invalid.

Other cases dealing with this general subject are: *Baltic Mining Co. v. Massachusetts*,¹⁷ *New York ex rel. Cornell Steamboat Co. v. Sohmer*,¹⁸ *Texas Co. v. Brown*,¹⁹ *Postal Telegraph Cable Co. v. City of Fremont*,²⁰ *Western Union Telegraph Co. v. Kansas*,²¹ *Pullman Co. v. Kansas*,²² *Ludwig v. W. U. Telegraph Co.*,²³ *Southern Railway Co. v. Greene*.²⁴

¹¹ 274 U. S. 284.

¹² *Cf. Am. Mfg. Co. v. St. Louis* (250 U. S. 459); *Heister v. Thomas Colliery Co.* (260 U. S. 243); *Oliver Iron Co. v. Lord* (262 U. S. 172).

¹³ 266 U. S. 555.

¹⁴ 192 U. S. 21.

¹⁵ 136 U. S. 114.

¹⁶ 236 U. S. 178.

¹⁷ 216 U. S. 1.

¹⁸ 235 U. S. 549.

¹⁹ 258 U. S. 466.

²⁰ 255 U. S. 124.

²¹ 216 U. S. 30.

²² 216 U. S. 56.

²³ 216 U. S. 146.

²⁴ 216 U. S. 400.

§ 623. States, in Levying Taxes, May Not Discriminate Against Interstate Commerce.

The States may not, by their tax laws, or, indeed, in any other manner, discriminate against interstate commerce; that is, against persons or corporations engaged in interstate commerce, against the property employed in, or the receipts from, interstate commerce, or against the commodities carried therein.

In *Ward v. Maryland* ²⁵ the court held void, because discriminatory, a State law by which persons not permanent residents in the State were prohibited from selling or offering for sale within a certain district of the State, any goods whatsoever other than agricultural products and articles manufactured in the State.

In *Welton v. Missouri* ²⁶ the same doctrine was declared, the court saying: "The commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it even after it has entered the State, from any burdens imposed by reason of its foreign origin."

In *Guy v. Baltimore* ²⁷ was adjudged invalid a municipal ordinance establishing certain wharfage rates to be paid by vessels carrying goods other than the productions of the State, the court, after a review of the authorities, saying: "In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

In *Webber v. Virginia* ²⁸ a State license law was again held invalid because dependent upon the foreign character of the articles dealt with. "If," the court said, "by reason of their foreign character, the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

In *Walling v. Michigan* ²⁹ a State law was held void, because discriminatory, which imposed a specific tax on persons, not having their principal place of business in the State, engaged in selling liquors at wholesale, or in soliciting or taking orders for such liquors to be shipped into the State

²⁵ 12 Wall. 418.

²⁶ 91 U. S. 275.

²⁷ 100 U. S. 434.

²⁸ 103 U. S. 334.

²⁹ 116 U. S. 446.

from outside the State, without imposing a similar tax upon persons engaged in the selling of liquors manufactured in the State.

In *Darnell & Son Co. v. Memphis*³⁰ the authorities were carefully reviewed, a law of Tennessee being held void which, while imposing a tax on the products of the soil of other States, exempted those produced from its own soil.

In *Minnesota v. Barber*³¹ a State inspection law was held invalid because it discriminated against meats coming into the State.

The foregoing and other cases make it plain that State tax laws, or, indeed, any other laws which bear in an adversely discriminatory manner upon interstate as compared with intrastate commerce, are invalid even though, in other respects, they are not open to constitutional objection.

In *Brown v. Maryland*³² it was held that a license tax on an importer, or on the business of importing goods from another State, is a taxation of, and, therefore, an unconstitutional interference with interstate commerce. This doctrine was somewhat disturbed in the License cases,³³ but has since been fully established.

§ 624. Drummers and Other Sales Agents.

The leading case establishing the doctrine that the negotiation by sales-agents of sales of goods which are in another State for the purpose of introducing them into the State where the negotiation is had, is interstate commerce and not subject to regulation or taxation by the State, is *Robbins v. Taxing District of Shelby Co.*³⁴

In *Asher v. Texas*,³⁵ and *Brennan v. Titusville*³⁶ the same doctrine was declared.

In *Ficklen v. Shelby Co.*³⁷ the doctrine was again asserted but declared not applicable to a license tax imposed upon a citizen doing a general commission business, though he was able to show that during the year for which he resisted the payment of the tax his commissions were wholly derived from interstate business, that is, orders taken for goods to be shipped into the State. The court argued that this was an adventitious circumstance and that having taken out a license to do a general commission business, and having agreed to pay a percentage thereon, the tax was to be construed as a general license tax and not one on interstate business. In a later case, the court, however, recognized that this case was on the boundary line of the States' power.³⁸

In *Stockard v. Morgan*³⁹ a privilege tax imposed by a State upon merchant brokers whose business was exclusively confined to soliciting orders

³⁰ 208 U. S. 113.

³¹ 136 U. S. 313.

³² 12 Wh. 419.

³³ 5 How. 504.

³⁴ 120 U. S. 489.

³⁵ 128 U. S. 129.

³⁶ 153 U. S. 289.

³⁷ 145 U. S. 1.

³⁸ *Brennan v. Titusville* (153 U. S. 289).

³⁹ 185 U. S. 27.

from jobbers and wholesale dealers within the State, as agent for non-resident parties, for goods to be shipped into the State by such parties, was held void as laying a burden upon interstate commerce.⁴⁰

In *Caldwell v. North Carolina*⁴¹ it was contended by the State that a tax levied by it for selling pictures therein was valid because though the contract of sale was made outside the State, the pictures and frames when sent into the State were unboxed by the agent who received them, and each picture put into its frame, before delivery to the purchaser. The court, however, said: "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two agencies instead of one in the delivery. It would seem evident that, if the vendor has sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

⁴⁰ After quoting from the *Ficklen* case, the court said: "From these extracts from the opinion it is seen that a material fact in the case was that *Ficklen* had taken out a general and unrestricted license to do business as a broker, and he was thereby authorized to do any and all kinds of commission business, and therefore became liable to pay the privilege tax exacted. Although *Ficklen's* principals happened in the year 1887 to be wholly non-residents, the fact might have been otherwise, as was stated by the Chief Justice, because his business was not confined to transactions for non-residents. In this case the complainants did not represent or assume to represent any residents of the State of Tennessee, and each of the complainants represented only certain specific parties, firms, or corporations, all of whom were non-residents of Tennessee. They did no business for a general public. We attach no importance to the fact that in the *Robbins* case the individual taxed resided outside of the State. He was taxed by reason of his business or occupation while within it, and the tax was held to be a tax upon interstate commerce. Nor does the fact that the complainants acted for more than one person residing outside of the State affect the question. If while so acting and soliciting orders within the State for the sale of property for one non-resident of the State, the person so soliciting was exempt from taxation on account of that business, because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual, firm, or corporation, all being non-residents of the State of Tennessee. The fact that the State or the court may call the business of an individual, when employed by more than one person outside of the State, to sell their merchandise, upon commission, a 'brokerage business,' gives no authority to the State to tax such a business as complainants'. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax upon interstate commerce."

⁴¹ 187 U. S. 622.

"Transactions between manufacturing companies in one State, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from State taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

In *Norfolk W. R. Co. v. Sims* ⁴² a license tax imposed by a State upon all persons engaged in selling sewing machines in the State was held void as applied to the sale of machines shipped into the State upon the written order of a customer under an ordinary C. O. D. consignment.⁴³

In *Adams Express Co. v. Iowa* ⁴⁴ the cases of *Caldwell v. North Carolina* and *Norfolk W. R. Co. v. Sims* were examined and approved.

In *Rearick v. Pennsylvania* ⁴⁵ it was held that interstate commerce is unlawfully burdened by the exaction of a license fee from a person employed by a foreign corporation to solicit sales for goods which the company fills by shipping the goods to him for delivery and collecting the purchase price from the customer, who has the right to refuse the goods if not equal in quality to the sample, such goods being always shipped in distinct packages, corresponding to the several orders.⁴⁶

⁴² 191 U. S. 441.

⁴³ To the contention that because in a C. O. D. consignment the sale could not be said to be consummated until delivery, that is, that the sale was made in the State by the express company delivering the machine, which company thereby became liable to the tax, the court said: "The sewing machine was made and sold in another State, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the State. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago; and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

⁴⁴ 196 U. S. 147.

⁴⁵ 203 U. S. 507.

⁴⁶ Except in the case of brooms which, after being marked and tagged, were for convenience of shipment, tied together into bundles of twelve or more. As to these brooms it was contended that the original bundle or package being broken before delivery the full authority of the State over them at once attached. To this Justice Holmes, who delivered the opinion of the court, said: "But the doctrine of the original packages concerns the right to sell, within the prohibiting or taxing State, goods coming into it from outside. When the goods have been sold before arrival the limitations that still may be found to the power of the State will be due, generally, at least, to other reasons, and we shall consider whether the limitations may not exist, irrespective of that doctrine, in some cases where there is no executed sale." These limitations are found in the doctrines laid down in *Brennan v. Titusville* and *American Express Co. v. Iowa*. "The brooms were specifically appropriated to specific contracts, in a practical, if not

§ 625. Peddlers.

As has been earlier seen, when property which has been introduced into a State has become commingled with the other property of that State, it ceases to enjoy the protection of the Commerce Clause. And thus it has been held that peddlers, as distinguished from drummers, that is, persons who carry with them the articles which they sell, or at least supply the articles sold from stocks of merchandise already in the State, may be required to pay a license fee, even though they deal exclusively with goods which have been imported from another State; provided, however, of course, that they are not discriminated against because of the fact that they sell goods brought in from outside the State.

In *Machine Co. v. Gage*⁴⁷ and in *Emert v. Missouri*⁴⁸ State laws imposing license fees upon peddlers were upheld as to persons selling exclusively sewing machines manufactured outside of the State and sent into the State to the peddlers to be disposed of by them as the agents of the manufacturers.

In *Emert v. Missouri* the court said: "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine which he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business and commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State."

The court then went on to point out that there was no discrimination against goods manufactured outside of the State, and that the statute in question was rather a police regulation to protect against fraud, than a revenue measure.

In *Banker Brothers Co. v. Pennsylvania*⁴⁹ it was held that interstate commerce was not taxed by a State law which imposed a tax upon a domestic corporation selling within the State automobiles built by a foreign corporation under an agreement according to which the foreign corporation agreed to build and sell to the domestic corporation for cash at a specified rate less than the list price, and there was nothing to connect the ulti-

in a technical sense. Under such circumstances it is plain that, whatever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce."

⁴⁷ 100 U. S. 676.

⁴⁸ 156 U. S. 296.

⁴⁹ 222 U. S. 210.

mate purchaser with the manufacturing company other than a warranty from it to them.

In *Crenshaw v. Arkansas* ⁵⁰ it was held that the business of travelling about taking orders and sending them to a manufacturer outside of the State for articles to be shipped into the State and delivered to the purchasers of them constituted an interstate commerce business and therefore might not be subject to a license tax by the State. The tax in question, it was declared, could not be defended as a proper police measure since the business was not one of peddling, namely, one in which the party carried around with him the articles which he sold, and, therefore, the holding of the court in *Emert v. Missouri* ⁵¹ did not apply.

In *Stewart v. Michigan* ⁵² it was held that a State license tax could not be imposed upon persons soliciting orders by samples, lists and catalogues, for goods which are afterwards shipped into the State in carload lots to such persons and by them delivered to the buyers. The case, it was held, was governed by the ruling in *Crenshaw v. Arkansas*.

In *Browning v. Waycross*,⁵³ it was held that the business of erecting lightning rods by agents of non-resident manufacturers, who shipped the rods into the State upon orders solicited and obtained by such agents, was not interstate commerce, and, therefore, might be subjected to a State annual occupation tax. "It is true," said the court, "that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business, protected by the commerce clause. It is manifest that if the right here asserted were recognized, or the power to accomplish by contract what is here claimed were to be upheld, all lines of demarcation between national and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one State to the other, and intended to be used after delivery in the construction of buildings or in the making of improvements in any form, would or could be made interstate commerce."

In *Singer Sewing Machine Co. v. Brickell* ⁵⁴ it was held that interstate commerce was not burdened by a State license or occupation tax upon the business of selling and delivering sewing machines as applied to a foreign corporation which maintained a store and regular place of business in each county of the State from which its agents were supplied with the machines which they sold.

⁵⁰ 227 U. S. 389. See also *Real Silk Hosiery Mills v. Portland* (268 U. S. 325).

⁵¹ 156 U. S. 296.

⁵³ 233 U. S. 16.

⁵² 232 U. S. 665.

⁵⁴ 233 U. S. 304.

§ 626. Taxation of Foreign Corporations.

The property of foreign corporations may be taxed as such by the State in which the property is situated. Ordinarily, taxes, other than the ordinary property taxes, imposed on foreign corporations as such are explicitly or are construed to be in the nature of license taxes. Such license taxes may, however, be imposed only in case the corporations may fairly be said to be "doing business" within the State. This is a fact which the courts, when appealed to, must determine in each case. It may be said, generally, however, that a corporation cannot be said to be "doing business" in the State unless it has established a trade domicile of some sort, that is, established a branch office, or created a sales agency, a factory, or a distributing warehouse.

If, however, the foreign corporation be a carrier carrying on interstate commerce, as, for example, a railroad or telegraph or telephone company, it may establish offices or other agencies for the transaction of its business within the State, free from liability to a license tax or other burden or restraint by the State. Thus, in *McCall v. California* ⁵⁵ a State law was held void under which it was attempted to collect a license tax upon agents soliciting passenger business for certain interstate railroads. ⁵⁶

The sending by a foreign corporation of agents through the State for the purpose of taking orders for goods, which goods are to be later shipped into the State, is an interstate commerce transaction, and does not constitute doing business in the State, so that a license tax may be imposed. ⁵⁷

In New York *ex rel. Hatch v. Reardon* ⁵⁸ the court held invalid, as an interference by the State with interstate commerce, a law of the State imposing a tax on transfers between two non-residents of the stock of a foreign corporation. Justice Holmes, delivering the opinion of the court, said: "There is not a shadow of a ground for calling the transaction described such commerce. The communications between the parties were not between different States, as in *Western Union v. Texas*, ⁵⁹ and the bargain did not contemplate or induce the transport of property from one State to another, as in the drummer cases. ⁶⁰ The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another State before they made it. . . . The facts that the property sold is outside the State, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several States, and that is all that there is here. On the general

⁵⁵ 136 U. S. 104; 10 Sup. Ct. Rep. 881; 34 L. ed. 391.

⁵⁶ Three justices dissented in this case upon the ground that the interference with interstate commerce was not sufficiently direct to bring it within the operation of the Commerce Clause.

⁵⁷ See § 624.

⁵⁸ 204 U. S. 152.

⁵⁹ 105 U. S. 460.

⁶⁰ *Rearick v. Pennsylvania* (203 U. S. 507).

question there should be compared with the drummer cases the decisions on the other side of the line." ⁶¹

In *Ware and Leland v. Mobile County*,⁶² the court held that the business of taking orders on commission for the purchase and sale of grain and cotton for future delivery, and sending them to another State, is not interstate commerce, so as to be exempt from State taxation, where, if the purchases are for future delivery, and there is an actual delivery, the grain or cotton is bought in the State to which the orders are sent, and there held for the purchaser, or where the seller is at liberty to acquire the property in the market where delivery is required or elsewhere. After calling attention to cases like *Paul v. Virginia*⁶³ and *Hooper v. California*⁶⁴ in which it was held that contracts are not the subjects of interstate commerce simply because negotiated between citizens of different States, or by the agent of a company in another State, where the contract is to be completed and executed wholly within the borders of the State, even though such contracts may incidentally affect interstate trade, the court observed: "These cases are not in conflict with those in which it is held that the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other is interstate commerce. . . . In these cases goods in a foreign State are sold upon orders for the purpose of bringing them to the State which undertakes to tax them, and the transactions are held to be interstate commerce, because the subject matter of the dealing is goods to be shipped in interstate commerce; to be carried between States and delivered from vendor to purchaser by means of interstate carriage. But how stands the present case upon the facts stipulated? The plaintiffs in error are brokers who take orders and transmit them to other States for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery as result in actual delivery of the grain or cotton, the stipulated facts show that, when the orders transmitted are received in the foreign State, the property is bought in that State and there held for the purchaser. The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another

⁶¹ Citing *Nathan v. Louisiana* (8 How. 73); *Woodruff v. Parham* (8 Wall. 123); *Brown v. Houston* (114 U. S. 622); *Emert v. Missouri* (156 U. S. 296).

⁶² 209 U. S. 405.

⁶³ 8 Wall. 169.

⁶⁴ 155 U. S. 648.

State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation to do so. In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic because of the contracts made by the brokers. These contracts are not, therefore, the subject of interstate commerce any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company. The delivery, when one was made, was not because of any contract, obliging an interstate shipment, and the fact that the purchaser might thereafter transmit the subject matter of the purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

It must clearly appear, however, that the license tax is exclusively upon the local business, and that its payment is not a condition precedent to the transaction of interstate business. And, furthermore, if the tax, whatever its name, amounts to more than an ordinary tax upon the property of the company doing both an interstate and domestic business, it will be held void. In *Postal Telegraph Cable Co. v. Adams*⁶⁵ the court said: "Property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

The exaction by a city of a tax on the poles of a telegraph company, doing an interstate commerce business, has been held to be not a license tax on the interstate commerce, but a rental for the use by the company of the city streets.⁶⁶ Such a tax, however, the court pointed out, may not be unreasonable in amount.⁶⁷

⁶⁵ 155 U. S. 688.

⁶⁶ *St. Louis v. Western Union Tel. Co.* (148 U. S. 92).

⁶⁷ *Cf. W. U. Tel. Co. v. Borough of New Hope* (187 U. S. 419), in which it was held that an ordinance imposing a license fee on telegraph poles was not void because it yielded a return in excess of amount necessary to meet the cost of supervision and inspection.

§ 627. State Taxation of Articles of Commerce.

In *Brown v. Maryland*,⁶⁸ decided in 1827, it had been held that a State law requiring all importers of foreign goods, and others selling the same by wholesale to pay a license fee was repugnant to the Commerce Clause.⁶⁹ A tax on the sale of an imported article was declared to be a tax on the article itself; and a tax on the importer a tax on the business of importing.

In *Woodruff v. Parham*⁷⁰ the doctrine declared in *Brown v. Maryland* was declared applicable only to imports from foreign countries. As to these it was declared the States might not exercise their taxing powers until, by the breaking of the original package, or sale by the importer, they had become commingled with the general goods of the States. This limitation upon the taxing power of the States was deduced from the constitutional prohibition as to the laying of export or import duties.

As to goods brought into the State from other parts of the United States, however, it was held that this constitutional prohibition did not apply, the terms export and import duties being declared to relate to foreign commerce only. And as to the Commerce Clause it was held that so long as the articles brought in are not discriminated against, no interference with interstate commerce is caused by their taxation, even in their original packages and unsold in the hands of the original consignee.

It will thus be seen that though the States may not, without the permission of Congress, extend the authority of their police regulations over articles of interstate commerce so long as they remain unsold and in their original packages in the hands of their original consignees, the law is otherwise as regards the taxing power. The distinction in favor of the taxing power is, according to the argument of the court in *Woodruff v. Parham* drawn from the consequences that would follow from an adoption of a contrary position, and from the purpose of the Commerce Clause in the minds of the framers of the Constitution, as shown in the historical records that have come down to us.

§ 628. State Taxation of Goods in Transit.

A difficulty which has not infrequently arisen with reference to the amenability of articles of interstate commerce to State taxation is the question when an article may fairly be said to be *in transitu* and when it may be said to have obtained a taxable *situs* in the State. That an article actually in transit from one State to another is not taxable by a State is admitted. That an article manufactured for interstate trade and intended to be sent outside the State, but its transportation thither not yet begun, is taxable in the State where located, is equally well established.

⁶⁸ 12 Wh. 419.

⁶⁹ And also that it was repugnant to the clause prohibiting the States from levying duties on exports and imports.

⁷⁰ 8 Wall. 123.

In *Brown v. Houston* ⁷¹ it was held that coal from another State, unsold, and for sale upon the barge upon which it had been brought, was taxable by the State. The court said: "The tax was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. . . . It had become a part of the general mass of property in the State, and as such it was taxed for the current year, as all other property in the city of New Orleans was taxed. . . . It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana."

The court went on to say: "When Congress shall see fit to make a regulation of the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general laws of the State."

In *Coe v. Errol* ⁷² the question was as to the taxation of certain logs cut in the State and drawn to another place in the State, whence they were to be floated down stream to a place outside the State. Because of low water they had not yet started upon this interstate portion of their trip. The logs were held taxable, the court thus fixing the doctrine that articles deposited or stored at an entrepôt for future interstate transportation are taxable by the State in which they are situated.

In *Diamond Match Co. v. Ontonagon*, ⁷³ however, it was held that logs cut and floated down a stream to a boom or sorting gap, from which they were to be shipped by rail outside the State, were, while awaiting delivery to the railroad, *in transitu* and not subject to state taxation.

In *Kelley v. Rhoads* ⁷⁴ it was held that sheep while being driven across the State of Wyoming, to the State of Nebraska at the rate of about nine miles a day, were exempt from taxation under a Wyoming law authorizing the taxing of live stock brought into the State for grazing purposes, although the sheep were permitted, incidentally, while in transit, to support themselves by grazing. ⁷⁵

⁷¹ 114 U. S. 622.

⁷³ 188 U. S. 82.

⁷² 116 U. S. 517.

⁷⁴ 188 U. S. 1.

⁷⁵ The court observed: "We do not deny that it may have been the plaintiff's intention not only to graze, but to fatten his sheep, while *en route* to Wyoming. Indeed, we may suspect it, but there is nothing in the agreed statement of facts to justify that inference."

In *American Steel & Wire Co. v. Speed*⁷⁶ the foregoing authorities were reviewed, and the doctrine declared that a State is not precluded by the Commerce Clause from imposing a manufacturer's tax upon a non-resident manufacturing corporation which has selected a city of the State as a distributing point, and engaged a local transfer company to take charge of its products when shipped to that point, assort them, store them and make delivery of them in the original packages to the firm's customers. Such goods, when stored, were declared to be no longer in transit.

In *Bacon v. Illinois*⁷⁷ it was held that grain shipped from southern and western States under contracts for its transportation to eastern States, but afterwards purchased while in transit by a resident of Illinois with the intent to forward it promptly according to the shipping contracts, but who had removed it from the cars in Chicago solely for purposes of inspection, weighing, etc., might be locally taxed while in his private elevator at Chicago. The court said: "neither the fact that the grain had come from outside the State, nor the intention of the owner to send it to another State, and there to dispose of it, can be deemed controlling when the taxing power of the State of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way, without discrimination."

In *Susquehanna Coal Co. v. South Amboy*⁷⁸ it was held that coal was subject to local taxation which had been shipped from outside the State by its owner, to his own order, to a point inside the State where, no ships being available for its immediate continued transportation, it was dumped into coal depots for later transportation when convenient or possible.

In *Champlain Realty Co. v. Town of Brattleboro*⁷⁹ logs placed in a river with intent to drive them to a mill in another State, but held for a few days

⁷⁶ 192 U. S. 500.

⁷⁷ 227 U. S. 504.

⁷⁸ 228 U. S. 665.

⁷⁹ 260 U. S. 366.

until the flow of water would permit their being so driven, were not subject to local taxation. Continuity of the interstate journey, it was held, had not been broken.⁸⁰

§ 629. State Taxation of Persons in Transit.

The right of persons to travel from State to State,⁸¹ though apparently not strictly upheld during the early years of the Constitution,⁸² has been, since the middle of the last century, well established. Though questioned and not clearly sustained in *New York v. Miln*,⁸³ and the *License* cases,⁸⁴ it was definitely declared in the *Passenger* cases,⁸⁵ decided in 1848, that the carrying of persons is commerce, and, therefore, that their travel from State to State is protected by the Commerce Clause from State interference. Also in *Crandall v. Nevada*,⁸⁶ decided in 1868, the right was held to be one which attaches to Federal citizenship and, therefore, one protected from State interference independently of the Commerce Clause.

In *Henderson v. Mayor of New York*⁸⁷ and *People v. Compagnie Générale Transatlantique*⁸⁸ State taxation of immigrants from foreign countries was declared unconstitutional, the validity of the laws not being saved by terming them police or inspection regulations.

§ 630. Taxation of Property of Interstate Carriers.

The right of the States to tax property, as such, of companies doing an interstate commerce business, is determined by the same principles as those stated in *Union Pacific R. R. Co. v. Peniston*⁸⁹ with reference to the taxa-

⁸⁰ The case was distinguished by the court, upon a basis of the facts involved, from *Coe v. Errol* (116 U. S. 517); *Bacon v. Illinois* (227 U. S. 504); *General Oil Co. v. Crain* (209 U. S. 211); *Diamond Watch Co. v. Ontonagon* (188 U. S. 82); *Brown v. Houston* (114 U. S. 622); and *Pittsburg Coal Co. v. Bates* (156 U. S. 577). It was recognized that *Coe v. Errol* most clearly resembled the instant case, but in that case, as the court pointed out, the logs had been withdrawn, temporarily at least, from interstate commerce, and the mere fact that the owner intended later to send them out of the State did not keep them in transit in interstate commerce. "But here," (in the instant case) said the court, "we have the intention put into accomplishment by launching and manifested by an actually continuous journey of more than half the drive, with a halting of less than half of it in the course of the interstate journey to save it from loss, and only for that purpose."

For an excellent discussion of the subject, see the series of articles entitled "Taxation of Things in Transit" by Professor T. R. Powell, in VII *Virginia Law Review*, pp. 167, 245, 429 and 497.

⁸¹ Subject, of course, to necessary quarantine provisions.

⁸² Cf. *Prentice and Egan, Commerce Clause*, pp. 212ff.

⁸³ 11 Pet. 102.

⁸⁴ 5 How. 504.

⁸⁵ 7 How. 283.

⁸⁶ 6 Wall. 35.

⁸⁷ 92 U. S. 259.

⁸⁸ 107 U. S. 59.

⁸⁹ 18 Wall. 5.

tion by the States of Federal agencies, namely, that "State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of this power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of Federal powers."

In *Postal Telegraph Cable Co. v. Adams*⁹⁰ the court said:

"It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment. . . . Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce, but the value of property results from the use to which it is put and varies with the profitability of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by a reference thereto, it is not open to attack as inconsistent with the Constitution." The doctrine thus declared as to the taxation of the property of interstate carriers has not been since disturbed. There has, however, been much controversy as to the manner in which the value of this property, for State taxing purposes, may be constitutionally determined; and also as to whether in particular cases the taxes involved have been property taxes and non-discriminating in character.

⁹⁰ 155 U. S. 688.

§ 631. Assessment of Property of Interstate Carriers for Purposes of State Taxation.

In *Henderson Bridge Co. v. Kentucky*⁹¹ it is held that, in assessing for taxation the property of a bridge company owning and operating a bridge across the Ohio river, connecting the shores of Kentucky and Indiana, the value of the franchise granted by the taxing State might be included as intangible property, and that the value of this franchise might be estimated by taking the total value of the entire property and subtracting therefrom the value of the tangible property in the taxing State and the value of all the property, tangible and intangible, in the other State.⁹²

In *Keokuk, etc., Bridge Co. v. Illinois*⁹³ it was held that a State tax on the capital stock of a bridge company consolidated from corporations of different States, which maintained an interstate bridge, was not a tax on a franchise conferred by the Federal Government, although the corporation had an authority under an act of Congress to construct the bridge. Also that such a tax was not a taxation of interstate commerce, because the bridge company did not itself transact any interstate business over it. The court quoted with approval the statement in *Henderson Bridge Co. v. Kentucky*⁹⁴ that "clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted."

§ 632. Taxation of Franchises as Property.

"The right and privilege, or the franchise, as it may be termed, of being a corporation is of great value to its members, and is considered as property which the corporation itself may acquire. According to the law of most States this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation. The right of the States thus to tax it has been recognized by this court and the State courts in instances without number."⁹⁵

That this right upon the part of the States to tax, as personal property, the franchises of foreign corporations doing business within the State, even though those corporations be exclusively engaged in interstate commerce, and that this tax may be exacted as a condition precedent to allowing the corporations to do an intrastate business, would seem to be well

⁹¹ 166 U. S. 150.

⁹² Four justices dissented.

⁹³ *Horn Silver Mining Co. v. New York* (143 U. S. 305).

⁹⁴ 175 U. S. 626.

⁹⁵ 166 U. S. 150.

established. It is equally well established that such a tax upon the franchise of a foreign corporation doing business in the State is not in violation of the Fourteenth Amendment to the Federal Constitution as an attempt to tax property beyond the jurisdiction of the State. The *res* taxed is the right of acting as a corporation in the State.⁹⁶

In determining for purposes of taxation the amount of rolling stock of an interstate carrier, it has been held that a State may ascertain the average number of cars continuously employed in the State, though no particular car may in fact be kept permanently employed in the State.⁹⁷

When valuing the property of carrier companies whose property extends over several States, each State is permitted to tax the amount of property within its own limits and to give to that amount a value bearing the same proportion to the value of the entire property of the company as the length of railway or telegraph or telephone line bears to the total length of the carrier system which is assessed. This, the court declared proper in *W. U. Telegraph Co. v. Mass.*⁹⁸ and again in *Pullman Palace Car Co. v. Pennsylvania*,⁹⁹ in the latter case saying that the method "was a just and equitable method of assessment, and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole of its capital stock and no more."

The court has, however, pointed out that this method of assessment is after all but a convenient one applicable in some cases, and that it is not to be erected into an absolute principle; for it might not be acceptable in those cases where it would work obvious injustice. An example of this would be where a railroad company has a large mileage in one State, but over land where construction expenses were inexpensive, and where terminal facilities are few and not costly, while in another State its mileage is small, but of expensive construction, and its terminal facilities elaborate and costly.¹⁰⁰

The chief constitutional objection to this method of valuation has been that the value of the property is based in very great degree upon its use as an instrument of interstate commerce, and that, therefore, a tax assessed upon this value is, in effect, a tax upon that commerce. This contention was urged with especial force, but without success, in the case of *Adams Express Co. v. Ohio*.¹⁰¹ In this case the State statute required the board of assessors "to proceed to ascertain and assess the value of the property of express, telegraph and telephone companies in Ohio, and in determining

⁹⁶ *St. Louis S. W. R. Co. v. Arkansas* (235 U. S. 350).

⁹⁷ *Pullman Palace Car Co. v. Penn.* (141 U. S. 18); *Union Refrigerator Transit Co. v. Ky.* (199 U. S. 194); *American Refrigerator Transit Co. v. Hall* (174 U. S. 70).

⁹⁸ 125 U. S. 530.

⁹⁹ 141 U. S. 18.

¹⁰⁰ *Pittsburg, etc., R. Co. v. Backus* (154 U. S. 421).

¹⁰¹ 165 U. S. 194.

the value of the property of said companies in this State to be taxed within the State and assessed as herein provided, said board shall be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the State of Ohio, in the proportion which the same bears to the entire property of said companies, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid." ¹⁰²

¹⁰² In behalf of the express companies it was contended that the law sought to tax property beyond the territorial jurisdiction of the State, and that it imposed a burden on interstate commerce. The court, however, speaking through Chief Justice Fuller, said: "Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and, whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by the ordinary means, does not affect interstate commerce, otherwise than incidentally, as all business is affected by the necessity of contributing to the support of government. As to railroad, telegraph, and sleeping-car companies engaged in interstate commerce, it has been often held by this court that their property in the several States through which their lines or business extended might be valued as a unit for the purposes of taxation taking into consideration the uses to which it was put, and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction. The valuation was thus not confined to the wires, poles and instruments of the telegraph company, or the roadbed, ties, rails, and spikes of the railroad company, or the cars of the sleeping company, but included the proportionate part of the value resulting from the combination of the means by which the business was carried on,—value existing to an appreciable extent throughout the entire main of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (*Railway Co. v. Backus*, 54 U. S. 421), or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular State bears to the whole number of miles traversed by them in that and other States (*Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18), or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a State bears to the length of its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State (*W. U. Tel. Co. v. Taggart*, 163 U. S. 1). Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the

In the Express Company case was thus established what is known as the "unit of use" rule, according to which the property of a company may be determined as a unity, if used as a single system, and that its value may be assessed for purposes of taxation at the value which, as such a unity, it has in use, namely, the net profits which it produces, and irrespective of what may be the value of the tangible property which is owned or employed; and that where this system extends into two or more States each State may, for purposes of taxation, consider as within its borders, an amount of property proportioned to the whole, as the amount of business done within the State is proportioned to total amount of business done.¹⁰³

In *Union Tank Line v. Wright*¹⁰⁴ the "Unit Rule" of assessment for taxation of the property of foreign corporations was again examined as applied to the cars of a tank company used for transporting oil in interstate commerce. By the State law involved the value of the cars to be assessed was obtained by taking a sum bearing the same ratio to the value of all the cars of the company that the miles of railroad in the State over which the cars moved bore to the total mileage traversed by the cars in all the States in which they were moved. This mode of assessment, the Supreme Court held, resulted in such a gross overvaluation as to render the tax illegal both as a violation of due process of law and as an undue burden upon interstate commerce. The Unit Rule itself, however, as a constitutional one, when justly and properly applied, the court reaffirmed.¹⁰⁵

In *Wallace and Hines*¹⁰⁶ it was again held that a State could not, consistently with either the Fourteenth Amendment or the Commerce Clause, fix, for the purpose of taxation, the value of a foreign interstate railway prop-

valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated."

In *American Refrigerator Transit Co. v. Hall* (174 U. S. 70) the foregoing language was quoted and approved, it being held in that case that a State might constitutionally tax refrigerator cars used on railroad of the State and required in their business, though owned by a corporation of another State, and being paid for by the railroad company on a mileage basis, though such cars are used within one State wholly for interstate commerce; and that a tax might be fixed upon the value of the average number of cars employed in the State.

¹⁰³ In *Fargo v. Hart* (193 U. S. 490) the court held that personal property owned by a non-resident express company and situated outside of the State, could not be taken into account in fixing the value, for taxation, of its property within the State, on the theory that the possession of such property by the company gave to it a better credit and thus a better opportunity to obtain business.

¹⁰⁴ 249 U. S. 275.

¹⁰⁵ Justices Pitney, Brandeis and Clarke dissented upon the ground that, in their opinion, the mode of assessment was not an arbitrary or unreasonable one.

¹⁰⁶ 253 U. S. 66.

erty by taking the total value of its stock and bonds and assessing a proportion of this value equal to the proportion borne by the main track mileage of the company in the State to its whole mileage, if by reason of topographical and other conditions the cost of the trackage was less than it was in other States.

§ 633. Vessels.

Vessels, for the purposes of taxation, have, generally speaking, their situs at their home ports, that is, where registered, irrespective of where they are operating as carriers. When, however, it appears that a boat is permanently located in a State, other than the one of registry, and doing business there, it may be taxed by that State.¹⁰⁷

§ 634. The Measurement of Value of Property Employed in Interstate Commerce by the Receipts Therefrom.

That a tax directly upon the receipts from interstate commerce operates as a burden upon that commerce and is therefore invalid, there is, and has been, no doubt.¹⁰⁸ However, it has been held that the States may use gross revenue from interstate commerce as a means of measuring the amount of taxes which, in themselves, are valid.

In the State Freight case ¹⁰⁹ a State statute which levied specific taxes upon every ton of freight transported by any railroad or canal in the State, was held invalid as to freight the transportation of which was not wholly within the State.

In *Western Union Tel. Co. v. Texas* ¹¹⁰ and *Western Union Telegraph Co. v. Seay* ¹¹¹ the same ruling was applied to State laws levying taxes upon telegraph messages.

In *Ratterman v. Western Union Tel. Co.* ¹¹² the State law involved sought to levy a tax upon the receipts of a telegraph company derived partly from interstate and partly from intrastate business. The court held the assessment void in so far as receipts from interstate business were concerned.

In the *State Tax on Railway Gross Receipts* case, ¹¹³ the court upheld a tax on the gross receipts of domestic corporations, including receipts from interstate commerce, the amount of such receipts being assessed in proportion to the mileage in the State; the ground being taken that the tax was upon a fund which had become the property of the company and

¹⁰⁷ *Northwestern Lumber Co. v. Chehalis County* (54 L. R. A. 212).

¹⁰⁸ *Western Union Tel. Co. v. Texas* (105 U. S. 460); *Fargo v. Mich.* (121 U. S. 230); *Phila. & S. M. SS. Co. v. Penna.* (122 U. S. 326); *Western Union Tel. Co. v. Alabama Bd. of Assessment* (132 U. S. 472); *Galveston H. & S. A. R. R. Co. v. Texas* (210 U. S. 217); *Crew Levick v. Penna.* (245 U. S. 292).

¹⁰⁹ 15 Wall. 232.

¹¹⁰ 105 U. S. 460.

¹¹¹ 132 U. S. 472.

¹¹² 127 U. S. 411.

¹¹³ *Philadelphia & R. R. Co. v. Pennsylvania* (15 Wall. 284).

mingled with its other property. The court said: "The tax is not levied, and indeed such a tax cannot be, until the expiration of each half year, and until the money received for freights, and from other sources of income, has actually come into the company's hand. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property."

Though followed in a number of subsequent cases, in *Philadelphia SS. Co. v. Pennsylvania*¹¹⁴ the reasoning of the court in *State Tax on Gross Receipts* was declared unsound and its doctrine abandoned, the court saying: "It would seem to be rather metaphysics than plain logic for the State officials to say to the company 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

The prohibition thus laid upon the States was, however, again substantially weakened in *Maine v. Grand Trunk R. R. Co.*¹¹⁵ in which it was held that, with reference to a foreign railway corporation which had leased the rights of a domestic corporation, a State might levy a tax on the right to exercise the franchises, whether domestic or foreign, within its borders and determine the value of this right, and, therefore, the amount of the tax, by the gross earnings of the company within the State as determined by its mileage therein.

Though later affirmed,¹¹⁶ in *N. Y., etc., Ry. v. Pennsylvania*, later cases indicate that the doctrine of *Maine v. Grand Trunk R. Co.* is to be strictly construed and that the principle declared in *Philadelphia SS. Co. v. Pennsylvania* is still unshaken. In the case of *Galveston H. & S. A. R. R. Co. v. Texas*¹¹⁷ a State law was held invalid which levied a tax upon railway companies, whose lines lay wholly within the State, "equal to one per centum of their gross receipts," it appearing that a part, and in some cases a considerable part, of these receipts, were derived from the carriage of persons or freight coming from or destined to points without the State. After declaring the case of *Philadelphia SS. Co. v. Pennsylvania* to be unshaken, the court intimated that the decision in *Maine v. Grand Trunk R. R. Co.* could be sustained only as viewing the tax in that case as in reality not a franchise tax but as a property tax on the additional value given to the tangible property of the company by being part of a going concern. The court observed that the line between a tax on receipts, and a tax on property, but measured by receipts, is often difficult to draw, but can be drawn, by taking into account the whole State scheme of taxation.¹¹⁸

¹¹⁴ 122 U. S. 326.

¹¹⁶ 158 U. S. 440.

¹¹⁵ 142 U. S. 217.

¹¹⁷ 210 U. S. 217.

¹¹⁸ The court said: "It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property, and to tax it at its actual value as a going

From the foregoing it would appear that the law with reference to the State taxation of the gross receipts of companies doing an interstate commerce business is not in as definite a shape as might be desired. One general principle may, however, be deduced from all the cases. This is, that a State tax is invalid, whatever its form, if in effect it lays a direct burden upon interstate commerce; and that, conversely, a State tax is valid, however measured, or (if we follow the doctrine of *Maine v. Grand Trunk Ry.*) whatever its form, which may be fairly held to be a tax on the property of the company, whether tangible or intangible. The tax being thus valid, if valid at all, only as a property tax, it may never amount to more than an ordinary property tax, and its non-payment may never involve a forfeiture of the right of the company to do an interstate commerce business. The doctrine of *Maine v. Grand Trunk Ry.* that a tax measured by the gross receipts may be sustained as a franchise or excise tax upon the right of the company to do business in the State is certainly unsound, and was, it would appear, as above indicated, so recognized by the court in *Galveston H. & S. A. R. R. Co. v. Texas*.

Perhaps the general doctrine which we have been considering is best stated and illustrated in *Postal Telegraph Cable Co. v. Adams*,¹¹⁹ in which it was held that a State has the power to levy on a foreign telegraph company doing both a domestic and an interstate business a franchise tax, the amount thereof being graduated according to the value of the property

concern. On the other hand, the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

As regards the tax in question, the court said: "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' 1 per cent. of gross receipts, and a tax of 1 per cent. of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.' Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the State."

¹¹⁹ 155 U. S. 688.

within the State, such tax being in lieu of all other taxes. Though in terms a franchise tax, the tax was held valid as, in fact, taking the place of a property tax which, of course, the State might constitutionally levy. The court said: "A tax [may be] imposed on the corporation on account of its property within the State and may take the form of a tax on the privilege of exercising its franchises within the State, and if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be levied directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

In *Meyer v. Wells Fargo & Co.*¹²⁰ it was held that a non-resident express company whose receipts were largely from its interstate commerce business, could not constitutionally be subjected to a State "gross revenue tax" levied on all public service corporations, which was in addition to the taxes levied upon an *ad valorem* basis upon the property of the corporation in the State, and equal to such proportion of a specified percentage of its gross receipts from every source as the proportion of its business done in the State should bear to the whole of its business. The court could find no warrant for deeming the tax a property tax, and held it to be similar to the one declared invalid in *Galveston H. & S. A. R. R. Co. v. Texas*.¹²¹

In *Cudahy Packing Co. v. Minnesota*,¹²² a State tax on freight line companies, such as those furnishing refrigerator cars to railroads, and computed upon the gross earnings of the companies from operations within the State was upheld upon the ground that it appeared that these earnings were used merely as a criterion to determine the value of the property in the State which was sought to be taxed.

In *Pullman Co. v. Richardson*,¹²³ it was held again that gross receipts both interstate and intrastate might be used as a means of measuring the value of property subject to taxation so long as there were present no facts which would cause such use to operate as a discrimination against interstate commerce. However, the State could not forfeit the right of a company to engage in interstate commerce in the State by reason of the non-payment of the tax, since such right is not within State control.

§ 635. State Taxation of Net Income from Interstate Commerce.

It is established that, with reference to the taxing powers of the States, a distinction is to be made between net and gross incomes derived from interstate commerce. Thus, it is undoubted that, provided there is no discrimination against interstate as compared with intrastate commerce, a State may, under a general income tax, include net income derived from inter-

¹²⁰ 223 U. S. 298.

¹²¹ 210 U. S. 217.

¹²² 246 U. S. 450.

¹²³ 261 U. S. 330.

state commerce, the reason for this permission being that, in this respect, the net income and property of companies doing the interstate commerce business stand upon the same footing.¹²⁴ In *United States Glue Co. v. Oak Creek*¹²⁵ the court said: "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax on property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

In an earlier case—*Crew Levick v. Pennsylvania*¹²⁶—it had been held that a Federal tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross business, was invalid by reason of its being both a tax upon the commerce and a duty upon exports; but, in *Peck & Co. v. Lowe*¹²⁷ an assessment upon the net income of a company, three-fourths of whose income was derived from the export of goods to foreign countries, was not a tax or duty on the articles exported, within the meaning of the prohibition of Article I, Section 9, Clause 5 of the Federal Constitution. Of the tax in question the court said: "It is not laid on articles in course of exportation, or on anything which inherently or by the usage of commerce is embraced in exportation or any of its processes. . . . At most exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins."

¹²⁴ *Phila. & S. Mail S. S. Co. v. Penna.* (122 U. S. 326).

¹²⁵ 247 U. S. 321.

¹²⁶ 245 U. S. 292.

¹²⁷ 247 U. S. 165.

The application of the foregoing reasoning to the levying of taxes upon net incomes derived from interstate and foreign commerce is evident.¹²⁸

§ 636. Taxation of Capital Stock of Interstate Commerce Companies.

Because of the control which a State has over corporations of its own creation, it is held that it may tax the entire capital stock of domestic corporations doing an interstate commerce business even though some of the property of those corporations is situated outside of the taxing State, when such a tax can be held to be not upon the property which in large measure gives the value to the capital stock, but upon the corporation as an entity, over which entity the State has full personal jurisdiction. The same rule has been applied to foreign corporations which have been permitted to consolidate with and thus become constituent elements of domestic corporations.¹²⁹

As to foreign corporations doing an interstate commerce business, it is held that their capital stock may be taxed only to the extent that such corporations have property within the taxing States. This doctrine has not been questioned since the decision of *Gloucester Ferry Co. v. Pennsylvania*.¹³⁰

The theory of these cases has been that, since it is within the absolute right of the State to create or decline to create the corporations concerned, it may tax the legal entities of its own creation. Thus, in *The Delaware Railroad Tax*,¹³¹ the court said: "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion." And, later in the same opinion: "The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports or tonnage, or transportation to other States, cannot be regarded as conflicting with any constitutional power of Congress."

§ 637. License Taxes on Foreign Corporations Doing Both Intrastate and Interstate Business.

The right of the States to levy taxes in the nature of license taxes upon foreign corporations doing both an intrastate and interstate business, and

¹²⁸ See also *Shaffer v. Curtis* (232 U. S. 37); *Atlantic Coast Line R. Co. v. Daughton* (262 U. S. 413); *Underwood Typewriter Co. v. Chamberlain* (254 U. S. 113); and *Bass, Ratcliff & Gretton v. State Tax Association* (266 U. S. 271).

¹²⁹ *Ashley v. Ryan* (153 U. S. 436); *The Delaware Railroad Tax* (18 Wall. 206); *State Railroad Tax cases* (92 U. S. 575).

¹³⁰ 114 U. S. 196.

¹³¹ 18 Wall. 206.

the manner in which the amounts of these taxes may be measured have given rise to a considerable number of cases in the decision of which the Supreme Court has found no little difficulty in pursuing a consistent course of judicial reasoning.¹³²

It is incontestable that foreign corporations may carry on an intrastate commerce business only with the consent, express or implied, of the States concerned. Predicated upon this fact, the States have claimed the right to levy license fees upon the granting or continuing of the enjoyment of this right, and that the amount and modes of measuring these fees are within their discretion.

In *Leloup v. Mobile*¹³³ the court declared invalid a general license tax on a foreign telegraph company on the ground that it affected its entire business, interstate as well as intrastate. It appears, however, that, in this case, no attempt was made to defend the tax upon the ground that it was levied upon the right of the company to do an intrastate business in connection with its interstate business. The tax was viewed as a general license tax upon the right of the company to do any business whatever within the State, and thus, as the court said, the question was squarely presented to it, whether a State, as a condition to doing business within its jurisdiction, might exact a license tax from a telegraph company, a large part of whose business was interstate in character. The court asked: "Can a State prohibit such a company from doing such a business within its jurisdiction; unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done." To the contention that a part of the business of the company was intrastate in character, and therefore taxable by the State, the court replied: "The tax affects the whole business without discrimination."

However, in *Osborne v. Florida*¹³⁴ the court upheld a State license tax, which, as construed by the State court, applied only to companies which should engage in business of an intrastate character. The court said: "It has never been held that, when the business of the company which is wholly within the State is but an incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State." The company concerned in this Osborne case was an express company and it was feasible for it to carry on its interstate business without engaging in a "local" or intrastate business.

¹³² See especially the series of acute articles by Professor T. R. Powell which appeared in Volumes XXXI and XXXII of the *Harvard Law Review*, under the title "Indirect Encroachments on Federal Authority by the Taxing Powers of the States."

¹³³ 127 U. S. 640.

¹³⁴ 164 U. S. 650.

In *Pullman Co. v. Adams*,¹³⁵ the question was as to the validity of a State law imposing a tax on Pullman and sleeping car companies carrying passengers between points within the State. The court upheld the law saying: "If the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by *Osborne v. Florida*. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax."

In *Allen v. Pullman's Palace Car Co.*¹³⁶ a State law imposing an annual tax of \$500 per car upon sleeping car companies doing business in the State and making no distinction between cars used in interstate and those used wholly in intrastate traffic, was held void as imposing a burden upon interstate commerce, upon authority of *Pickard v. Pullman Southern Car Co.*¹³⁷ But, a law imposing a license fee of \$3000 per annum upon sleeping car companies which should carry one or more local passengers on cars operated within the State, was held valid where the companies were free to decline all local business should they see fit to do so, thus affirming the doctrine of *Allen v. Pullman's Palace Car Co.*¹³⁸

In *Western Union Telegraph Co. v. Kansas*¹³⁹ and *Pullman Co. v. Kansas*,¹⁴⁰ however, we find a stricter doctrine applied to the States, and taxes levied upon foreign companies as a condition to permitting them to continue to do a local business within the State were held invalid as burdensome to the interstate business of these companies, as well as, according to the opinion of certain of the concurring justices, in violation of the due process clause of the Fourteenth Amendment. Both of these reasons for declaring the invalidity of the laws were grounded upon the fact that it was not practicable, without great pecuniary loss, for the companies concerned to dissociate their intrastate and interstate businesses and abandon the former. In both cases the law involved was one imposing a "Charter fee" of a given per cent of the entire authorized capital stock of the companies desiring to do a local business in the State. In both cases the companies concerned, prior to the enactment of the laws in question, had lawfully entered the State with its consent for the purpose of doing both an intrastate and an interstate business, and, to that end, had made large investments in property in the State.

To the contention that the State, having the right to refuse consent to the entrance of a foreign corporation into the State for doing a purely local or domestic business, might attach to the granting of that assent any terms that it might see fit, Justice Harlan, in his opinion in *Western Union Tel.*

¹³⁵ 189 U. S. 420.

¹³⁶ 191 U. S. 171.

¹³⁷ 117 U. S. 34.

¹³⁸ 191 U. S. 171.

¹³⁹ 216 U. S. 1.

¹⁴⁰ 216 U. S. 56.

Co. v. Kansas, said that the actual effect of the law, if enforced, would be to compel the company to abandon its constitutional right of carrying on its interstate commerce business within the State, or at any rate, to allow that business to be burdened by the tax that was sought to be imposed. But this would be in violation of the well-established doctrine that States could not make it a condition precedent to a foreign corporation being granted the right to do business in a State that the corporation should surrender a privilege secured to it by the Constitution and laws of the United States.¹⁴¹ Justice Harlan said: "The statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the State school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce as conducted by the company, and its property outside the State, contribute to the support of the State's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise would be to allow form to control substance. . . . We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better or more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business."

Justice Harlan also referred to the fact that the effect of the law, if enforced, would be to tax property located beyond the limits of the State, which, it was established, might not constitutionally be done.

Distinguishing the instant case from the earlier cases, Justice Harlan pointed out that, in *Osborne v. Florida*,¹⁴² no real burden was imposed by the State's law upon interstate commerce; but, in *Pullman Co. v. Adams*,¹⁴³ the license tax that was imposed was not disproportionate to the local business involved, and, therefore, could not be held to be a device to reach or burden the interstate commerce of the company concerned. As to the instant case, Justice Harlan said that the fact that the Western Union Telegraph Company was engaged in interstate commerce was no reason, in itself, why Kansas might not, in good faith, require it to pay a license tax strictly on account of local business done by it in that State. But, he said, it was altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it would first pay to the State a given per cent of all its capital stock, representing all of its property, wherever situated, and all its business in and

¹⁴¹ Citing especially *Southern Pacific Co. v. Denton* (146 U. S. 202).

¹⁴² 164 U. S. 650.

¹⁴³ 189 U. S. 420.

outside of the State." As to *Allen v. Pullman's Palace Car Co.*,¹⁴⁴ Justice Harlan pointed out that the State law which was upheld in that case, at the most, but indirectly affected the interstate commerce of the company concerned. As to the case of *Security Mutual Life Insurance Co. v. Prewitt*,¹⁴⁵ Justice Harlan deemed it sufficient to point out that, in that case, no matter of interstate commerce was concerned, and that the general doctrine declared in that case could not be held to govern interstate commerce which "was a business of an exceptional character, and was protected by the Constitution against interference by State authority."

The effort of Justice Harlan thus to avoid the application of the *Prewitt* case can hardly be said to have been a logical one, since, in that case also, a Federal right or privilege was involved. However, so far as the ruling in the instant case was founded upon the premise that the State law would operate to take property without due process of law, it, of course, would not be controlled by the *Prewitt* doctrine. This was pointed out by Justice White in his concurring opinion. He said: "This case is concerned not with the power of the State to prevent a corporation from coming in for the purpose of doing local business, and to attach conditions to the privilege of so coming in, but involves the right of the State to confiscate the property of a corporation already within the State, and which has been there for years, devoted to the doing of local business, as the result of the implied invitation or tacit consent of the State arising from its failure to forbid or to regulate the coming in."¹⁴⁶

In *Pullman Co. v. Kansas*,¹⁴⁷ decided two weeks after the *Western Union* case, the court held invalid a State law restraining a foreign sleeping car company from doing a local business in the State unless it had paid a "charter fee" of a given per cent upon its entire capital stock. Justice Harlan again prepared the principal opinion in which he followed the reasoning of his opinion in the *Western Union* case; and Justice White concurred, but this time emphasizing the interference by the State law with interstate commerce rather than its denial of due process of law. He said: "Where the right to do an interstate commerce business exists, without regard to the assent of the State, a State law which arbitrarily forbids a corporation from carrying on with its interstate commerce business a local business would be a direct burden upon interstate commerce."

It is clear that these two cases marked a decided advance upon the part of the court in freeing interstate commerce from possible control or interference by the States, for, whereas, prior to these cases, the power of the States to control intrastate commerce had been regarded as an absolute one, it was, in these cases declared to be a qualified one, that is, one which

¹⁴⁴ 191 U. S. 171.

¹⁴⁵ 202 U. S. 246.

¹⁴⁶ It is to be noted that the *Prewitt* case has since been squarely overruled by the Supreme Court.

¹⁴⁷ 216 U. S. 59.

might not be exercised in such a manner as, in practical effect, to burden or interfere with interstate commerce. And, furthermore, it was recognized by the court that, as a practical fact, the carrying on of a local or intrastate business, in many cases, or, at any rate, with reference to the transmission of telegraphic messages and the railway transportation of persons and property, being so indissolubly connected, the denial to an interstate commerce company of a right to engage also in intrastate commerce, unless it pay a tax which is not reasonably proportioned in amount to, or measured by the amount of its local business, is an unconstitutional interference with interstate commerce.¹⁴⁸

At the time these cases were decided the Minnesota Rate cases¹⁴⁹ had not been decided, and it may be pointed out that they strengthen the logical ground for the ruling that, as a practical fact, the intermingling of interstate and intrastate business may cause a regulation of the latter to operate as an interference with the former, and that, when this is the case, the State's power of regulation must yield to that of the Federal Government.

The doctrine declared in *Western Union Tel. Co. v. Kansas*, and *Pullman Co. v. Kansas*, was again applied in *Ludwig v. Western Union Tel. Co.*¹⁵⁰ and *Atchison, Topeka & Santa Fe R. Co. v. O'Connor*.¹⁵¹

In the foregoing cases, the taxes involved had been such, in amount, as to convince the court that they were not reasonably proportionate, as license fees, to the intrastate business, for the carrying on of which they purported to be levied. In *Baltic Mining Co. v. Massachusetts*,¹⁵² however, this appeared not to be the case, and also that the business of the company was such that its purely local business was separable from, and, in fact, was carried on separately from its interstate business,¹⁵³ and the State tax was upheld although its amount was measured by, that is, was a percentage of, the entire authorized capital stock of the company. Distinguishing the instant case from the cases which have been discussed above, the court said: "Every case involving the validity of a tax must be decided upon its own facts, and, having no disposition to limit the authority of those cases, the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies

¹⁴⁸ It does not need to be said that even if the tax levied upon the doing of a local business is a reasonable one, it cannot, constitutionally be discriminative; that is, bear only or more heavily upon companies doing an interstate business than it does upon companies not so doing.

¹⁴⁹ 230 U. S. 352.

¹⁵¹ 223 U. S. 280

¹⁵⁰ 216 U. S. 146.

¹⁵² 231 U. S. 68.

¹⁵³ The company was incorporated to carry on a business which was not of itself interstate commerce, but its products were sold and shipped in such commerce.

of State and interstate character. In the *Western U. Teleg. Co.* case, the company had a large amount of property permanently located within the State, and between 800 and 900 offices constantly carrying on both State and interstate business. The Pullman Company had been running a large number of cars within the State, in State and interstate business, for many years. There was no attempt to separate the intrastate business from the interstate business by the limitations of State lines in its prosecution. . . .

. . . From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved. In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporations, including that used in such commerce, represented by the authorized capital of the corporations, is taxed, and therefore interstate commerce is unlawfully burdened by a State statute. . . . If the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

In *St. Louis S. W. R. Co. v. Arkansas* ¹⁵⁴ it was held that an annual franchise tax imposed by a State upon a foreign corporation "for the privilege of exercising its franchise in this State," of a specified percentage of the outstanding capital stock of the corporation represented by property used in business transacted in the State, was not repugnant to the Commerce Clause as applied to a foreign railway company doing both interstate and intrastate business. The court pointed out that the tax was in no way based upon the receipts of the company upon its interstate business, whether taken alone or in connection with its intrastate business, and therefore did not fluctuate with the value of that business.¹⁵⁵

In *Kansas City, etc., R. Co. v. Botkin*,¹⁵⁶ an annual tax, graduated ac-

¹⁵⁴ 235 U. S. 350.

¹⁵⁵ Authority for this decision was found in the prior cases of *Postal Telegraph Cable Co. v. Adams* (155 U. S. 688); *Atlantic & P. Tel. Co. v. Philadelphia* (190 U. S. 160); *Western Union Tel. Co. v. Atty. Gen.* (125 U. S. 530; 141 U. S. 40); *Pittsburg, C., C. & St. P. R. Co. v. Backus* (154 U. S. 421); *Indianapolis & V. R. Co. v. Backus* (154 U. S. 438); *Cleveland, C., C. & St. L. R. Co. v. Backus* (154 U. S. 439); *Western Union Tel. Co. v. Taggart* (163 U. S. 1); and *Western Union Tel. Co. v. Missouri* (190 U. S. 412).

¹⁵⁶ 240 U. S. 227.

according to paid-up capital stock, the maximum charge being \$2500 levied on all domestic corporations for the privilege of being corporations was upheld as to a railway corporation whose lines extended outside the State. In *Lusk v. Botkin*,¹⁵⁷ decided the same day, was upheld an annual State tax upon a foreign railway corporation doing business in the State, measured by that proportion of its capital stock which was devoted to its business within the State. In the first of these cases the court again emphasized the fact that, in considering the validity of a State tax as applied to companies doing an interstate commerce business "the substance of the exaction,—its operation and effect as enforced," should be held controlling. The court said: "In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce, either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax,—on the privilege granted by the State of being a corporation,—and while it is graduated according to the amount of paid-up capital stock, the maximum charge is \$2500 in the case of all corporations having a paid-up capital of \$5,000,000 or more. This is the amount imposed in the present case, where the corporation has a capital of \$31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce.

"For similar reasons, the contention cannot be sustained that the tax was one on property beyond the jurisdiction of the State. Undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property. But the present tax cannot be regarded as a property tax at all."¹⁵⁸

In *Looney v. Crane Co.*¹⁵⁹ the court made it very clear that the later cases had in no way modified the doctrine of *Western Union Tel. Co. v. Kansas*,¹⁶⁰ and *Pullman Co. v. Kansas*,¹⁶¹—that in these, as in the later cases, the doctrine that the substance rather than the shadow determines the validity of the exercise of the power," had been applied, and that, in determining this substance the special facts of each case had been examined and held controlling. As to the conflict between the Federal constitutional freedom of interstate commerce from State control and the State constitutional right to control the doing of intrastate business by a foreign corporation, the court, speaking through Chief Justice White, used language which deserves quotation. "The sole contention, then, upon which the [State] acts can be sustained, is that although they exerted a power which could

¹⁵⁷ 240 U. S. 236.

¹⁵⁸ See construing and affirming this case, *Kansas City M. & B. R. Co. v. Stiles* (242 U. S. 111).

¹⁵⁹ 245 U. S. 178.

¹⁶⁰ 216 U. S. 1.

¹⁶¹ 216 U. S. 56.

not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount, but are subordinate to and may be set aside by State authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other." To state this proposition, said the Chief Justice, was to demonstrate its invalidity.

It may be observed that in the *Looney* case there was involved a law imposing a tax as a condition to admitting a foreign interstate commerce corporation to engage in business in the State which was based upon the entire authorized capital stock of the corporation and with no maximum fixed as to the amount that might be so levied. Here, as in the earlier cases, the law was held to be invalid not only as an interference with the Federal commerce power, but as an attempt to tax property beyond the jurisdiction of the State, and, therefore, an attempted taking of property without due process of law.

In *Alpha Portland Cement Co. v. Massachusetts*¹⁶² a State law which imposed an excise tax on foreign corporations measured by the proportion of capital attributed to transactions within the State and income derived therefrom, was held invalid as an interference with interstate commerce as applied to a foreign corporation maintaining in the State only a local sales office for the soliciting of sales. The law was held also to deny due process of law in that it attempted to tax property not within the State.¹⁶³ The tax was declared to be not materially different from that held unconstitutional in *Cheney Bros. Co. v. Massachusetts*.¹⁶⁴

¹⁶² 268 U. S. 203.

¹⁶³ As to this second constitutional defect, the court referred to *Union Tank Line Co. v. Wright* (249 U. S. 275), in which it was held that making the ratio which the miles of railway in the State over which the tank cars of the foreign corporation were moved (the foreign corporation doing no business in the State and having no office there) bore to the total mileage traversed by the tank cars in all the States, the sole basis of assessment for State taxation of the property of the corporation in the State, was so arbitrary and so unreasonable in its effects as to operate as a taking of property without due process of law.

¹⁶⁴ 246 U. S. 147.

CHAPTER LXI

BANKRUPTCY, COINAGE, WEIGHTS AND MEASURES

§ 638. Bankruptcy: Definition of.

The Constitution gives to Congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States."

The construction which has been given to this clause furnishes one of the few exceptions to the general rule that the technical terms of the Constitution are to be given the meanings which they had at the time the Constitution was adopted. In 1789 "bankruptcy" and "insolvency" had, in the English law, different and distinct meanings. Bankruptcy applied only to merchants or traders charged with having committed some fraudulent or *quasi*-fraudulent act upon their creditors, who thereupon might institute proceedings to have their debtor declared a bankrupt, his property taken and distributed in payment of his debts, and he himself either discharged from further liability therefor, or imprisoned as the court might think fit. Insolvency, upon the other hand, described the status of a debtor, not a trader, who, in order to obtain a discharge might in certain cases surrender, or offer to surrender, all his property in payment of his debts.

In this country, however, from the beginning Congress and the Supreme Court have given to the term "bankruptcy" a meaning broad enough to cover "insolvency" as well. Indeed no distinction between the two was recognized in the colonies before the separation from England.¹

By various acts Congress has, from time to time, enacted laws providing for both voluntary and involuntary bankruptcy, that is, for proceedings instituted by the debtor himself or *in invitum* by his creditors. The details of this legislation need not be here given. It is sufficient to say that the first law was enacted in 1800, and repealed in 1803; the second law in 1841 and repealed in 1843; the third in 1867, and after being several times amended, repealed in 1878; the fourth law, now in force as amended, being passed July 1, 1898.

¹ Story, *Commentaries*, Ch. VI. In *Sturges v. Crowninshield* (4 Wh. 122), Marshall said: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one to which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law." See *Hanover National Bank v. Moyses* (186 U. S. 181), in which the authorities on this point are reviewed.

§ 639. Federal Power not Exclusive.

In *Sturges v. Crowninshield*,² affirmed in *Ogden v. Saunders*,³ the court held that the power to establish bankruptcy laws is not exclusively vested in Congress, but may be exercised by the States in the absence of Federal legislation.

§ 640. State Bankruptcy Laws and the Obligation of Contracts.

The right of the States, in the absence of conflicting congressional legislation, to enact bankruptcy laws is limited by the provision of the Constitution that no State shall pass any law impairing the obligation of contracts. Indeed, if we are to accept the statement of the court in *Hanover v. Moyses*⁴ this prohibition was made for this express purpose.⁵

In *Sturges v. Crowninshield* the court held invalid a State law which discharged the debtor from a contract entered into previous to its passage.

In *Ogden v. Saunders* the court held valid a State bankruptcy law which discharged the debtor and his future acquisitions of property so far as it related to debts contracted subsequent to the passage of the law. The law was thus, in effect, read into each contract as a clause thereof.⁶

The authority of the States to deal by bankruptcy or other laws with contracts entered into subsequent to their enactment is plenary. "The inhibition of the Constitution [as to the impairment of contracts] is wholly prospective. The States may legislate as to contracts thereafter made, as they may see fit. It is only those in existence when the hostile law is passed that are protected from its effect."⁷ Thus the States have been permitted to exempt at will from execution, or from attachment and distribution under bankruptcy proceedings, such classes and amounts of the debtor's property as they may see fit.

§ 641. State Bankruptcy Laws Have no Extraterritorial Force.

In *Ogden v. Saunders* was laid down the important principle that a certificate of discharge under a State law cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. The creditor of another State is, however, concluded by the discharge in bankruptcy if, by appearance or otherwise, he has made himself a party to the original insolvency proceedings.

It is thus seen that the power of the States in the matter of bankruptcy

² 4 Wh. 122.

³ 12 Wh. 213.

⁴ 186 U. S. 181.

⁵ The court said: "As the States, in surrendering the power, did so only if Congress chose to exercise it, but in the absence of congressional legislation retained it, the limitation was imposed on the States that they should pass no 'law impairing the obligation of contracts.'"

⁶ *Edwards v. Kearzey* (96 U. S. 595).

⁷ See, for example, *Denny v. Bennett* (128 U. S. 489).

does not extend to an absolute release of the debtor from the obligation of his contracts. "The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded; but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court."⁸

The United States is, of course, not under this territorial limitation in the exercise of its bankruptcy powers, and furthermore, it is not limited with reference to the impairment of the obligation of contracts. National bankrupt laws may, therefore, be made applicable to contracts already entered into at the time of their passage.⁹

§ 642. Uniformity.

It is, however, required of national bankrupt laws that they shall be uniform. The uniformity is a geographical one. The laws must, in all their provisions, be equally applicable to all of the States, and to incorporated territories.¹⁰

By Section 6 of the act of 1898 it is provided that: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition." A somewhat similar provision appeared in the act of 1867. These exemptions, the character and amount of which are thus made dependent on State laws, have been held not to destroy that geographical uniformity which the Constitution requires.¹¹

In *Re Deckert*¹² the court said: "The power to except from the operation of the law property not liable to execution under the exemption laws of the several States, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all

⁸ *Denny v. Bennett* (128 U. S. 489). See also *Brown v. Smart* (145 U. S. 454).

⁹ *In re Klein* (1 How. 277 note); *Hanover Nat. Bank v. Moyses* (186 U. S. 181).

¹⁰ *Quære* as to unincorporated territories.

¹¹ Nor to violate the principle that Congress may not delegate legislative power to the States. *Hanover Nat. Bank v. Moyses* (186 U. S. 181).

¹² 2 Hughes, 183, Fed. Cas. No. 3,728.

the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution."

And in *Hanover Nat. Bank v. Moyses*, the court declared: "We concur in this view, and hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee [under the Act of 1898] takes in each State whatever would have been available to the creditor if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States."

§ 643. Due Process of Law and Bankruptcy Laws.

Provisions for voluntary proceedings in bankruptcy are not in violation of the due process of law clauses of the Fifth and Fourteenth Amendments, even when, as in the act of 1898, there is no requirement as to personal notice to creditors of the filing of the petition. In the *Hanover Bank* case the court said: "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law. . . . Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*. . . . Creditors are bound by the proceeding in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from incumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree."

§ 644. State Laws Suspended but Not Annulled by Federal Bankruptcy Law. Effect of the Law of 1898.

The enactment of a national bankrupt law does not operate to annul State laws on the same subject, but simply to suspend their operation so long as the national regulations are in force. Upon the repeal of the Federal law the State laws at once revive, and do not need reenactment.¹³ So also a State law passed while a Federal bankruptcy law is in force goes at once into force with the repeal of the Federal statute.¹⁴

¹³ *Butler v. Goreley* (146 U. S. 303).

¹⁴ *Palmer v. Hixon* (74 Me. 447).

The precise effect of the enactment of a Federal bankruptcy law in suspending the operation of existing State laws is not definitely determinable from the decisions of either the State or Federal courts. That a State law covering the same ground as the national act, even though its provisions be not inconsistent therewith, is suspended is generally, though not uniformly, admitted.¹⁵ If, then, it be conceded that the intention of Congress was, by the enactment of a bankrupt law, to cover the entire subject, all State laws relating to bankruptcy are suspended while the national law remains in force.¹⁶

Even if the view be accepted that by the act of 1898 the general subject of bankruptcy is fully covered there still remains, in many cases, the difficulty of determining when State laws relating to general assignments for the benefit of creditors, receivership of corporations, etc., may be held to be in the nature of bankruptcy laws and as such rendered inoperative during the existence of the Federal law. The purposes of this treatise do not, however, require a more particular discussion of this point.

COINAGE AND STANDARDS OF WEIGHTS AND MEASURES

§ 645. Coinage.

Congress is given power "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

The authority thus given has been freely exercised by Congress but this legislation has given rise to very few constitutional questions.

It is to be observed that power is to be given not only to coin, but to provide what shall be the legal tender value of the pieces coined. There has been no question but that the States possess no concurrent jurisdiction. The power is an exclusively Federal one.¹⁷

§ 646. Weights and Measures.

With reference to standards of weights and measurements, the rule is otherwise, the States being recognized to have power to legislate in the absence of congressional action.

¹⁵ *Tua v. Carriere* (117 U. S. 201). See also authorities cited by Professor Williston in article "The Effect of a National Bankruptcy Law upon State Laws," in *Harvard Law Review*, XXII, 547.

¹⁶ Differing views have been taken by the different courts as to generality of the Federal law of 1898. In Maryland, Pennsylvania, and Colorado, State laws have been held operative as to classes of persons and corporations not coming within the operation of the national law. Upon the other hand, the courts of other States have taken what would seem to be the better view that by the enactment of 1898 Congress intended the general subject of bankruptcy to be covered. See the authorities cited by, and the argument of, Professor Williston in the article referred to in the preceding note.

¹⁷ By Section X, Clause 1, of Article I, the States are expressly denied the power to coin money.

COUNTERFEITING

§ 647. Counterfeiting.

Congress is expressly given the power "to provide for the punishment of counterfeiting the securities and current coin of the United States." There is little doubt, however, that, had the power not been expressly given, it would have been held implied in the power given to coin. The power of Congress to prohibit and to provide punishment for the counterfeiting of the coins and securities of foreign countries is considered elsewhere.¹⁸

§ 648. The Passing and the Uttering of Counterfeit Coins Distinct Offences.

The passing of counterfeit coins or securities is an offence distinct from that of coining or "uttering" them, but the power to punish the former is implied in the authority to forbid the latter.

With reference to this distinction between the uttering and the passing of counterfeit currency, the court in *Fox v. Ohio* ¹⁹ said: "The power is an offense directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely if it will in any degree, be reached. . . . The punishment of a cheat or a misdemeanor practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable."

Under its powers to regulate commerce and to punish counterfeiting, Congress has been held to have the power to provide punishment for the bringing into the United States, with intent to pass the same, false, forged or counterfeit coin, as well as for the passing or uttering of the same.²⁰

In *Fox v. Ohio* ²¹ it was held that the grant of power to the United States to punish the uttering and passing of counterfeits of its coins did not deprive the States of the power to render penal and to punish these acts. It was pointed out by the court that the same act thus might constitute as to its character and consequences an offence against both the State and Federal Governments. This doctrine was approved in *United States v. Marigold*.

¹⁸ See p. 333.

¹⁹ 5 How. 410.

²⁰ *United States v. Marigold* (9 How. 560).

²¹ 5 How. 410.

CHAPTER LXII

THE POSTAL POWER ¹

§ 649. Federal Power.

The Federal control of the postal service is granted in the clause of Article I, Section VIII which provides that Congress shall have the power "to establish post-offices and post-roads." "No other constitutional grant," as Pomeroy observes,² "seems to be clothed in words which so poorly express its object, or so feebly indicate the particular measures which may be adopted to carry out its design. To establish post-offices and post-roads, is the form of the grant; to create and regulate the entire postal system of the country is the evident intent."

Aside from the express grant of the power to establish post-offices and post-roads, it would seem that Congress would have the power to control the mails, between the States at least, as incidental to the regulation of commerce. In the *Pensacola Telegraph Co. v. Union Telegraph Co.*³ it was held that the transmission of telegraphic messages is not only commerce and as such, when interstate, subject to congressional regulation, but is an operation that may fairly be brought under the power to establish post-roads.

"Post-offices and post-roads," said the court, "are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress because, being national in their operation, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstance."

§ 650. Constitutional Views of Monroe.

In early years the view was maintained by some that by this grant Congress was given the power only to designate the routes over which the mails should be carried, and the post-offices where they should be received and distributed, and to exercise the necessary protection in relation thereto, and that it did not provide the authority to construct and operate agencies for the carrying and distributing of mails. This was substantially the view

¹ For an able comprehensive study of this power, see the monograph of Professor Lindsay Rogers entitled "The Postal Power of Congress," published in the *Studies in Historical and Political Science*, Vol. XXXIV (1916) of the Johns Hopkins University.

² *Constitutional Law*, § 411.

³ 96 U. S. 1.

taken by Monroe in the paper sent to Congress in connection with his veto of May 4, 1822, of the Cumberland Road Bill.

"If we were to ask any number of our enlightened citizens, who had no connection with public affairs, and whose minds were unprejudiced, what was the import of the word 'establish' and the extent of the grant, which controls," said Monroe, "we do not think, that there would be any difference of opinion among them. We are satisfied, that all of them would answer, that a power was thereby given to Congress to fix on the towns, court-houses, and other places, through our Union, at which there should be post-offices; the routes, by which the mails should be carried from one post-office to another, so as to diffuse intelligence as extensively, and to make the institution as useful as possible; to fix the postage to be paid on every letter and packet thus carried to support the establishment; and to protect the post-offices and mails from robbery, by punishing those who should commit the offense. The idea of the right to lay off the roads of the United States, on a general scale of improvement; to take the soil from the proprietor by force; to establish turnpikes and tolls, and to punish offenders in the manner stated above, would never occur to any such person. The use of the existing road, by the stage, mail-carrier, or post-boy, in passing over it, as others do, is all that would be thought of; the jurisdiction and soil remaining to the State, with a right in the State, or those authorized by its legislature, to change the road at pleasure."

§ 651. Federal Power to Provide Postal Agencies.

In considerable measure Congress has in its legislation kept within the limits of the power conceded to it by Monroe, but, when it has thought it wise, it has not hesitated to overstep them, and its constitutional right so to do has for years been conceded.⁴

In *California v. Central Pacific R. R. Co.*⁵ was involved the power of Congress to construct, or to authorize individuals to construct railroads across the States and Territories. This power the court held was implied not only in the power given to Congress to regulate commerce, but in its authority to provide for postal accommodations and military exigencies.

§ 652. Carrying of Mail Monopolized by the Federal Government.

There has never been any dispute as to the constitutional power of the Federal Government to monopolize for itself the business of carrying mail matter, for, in all countries, and since early times, this monopolization has been practiced by governments, and this fact must have been in the minds of the framers and adopters of the Constitution when they vested the Postal Power in the National Government. Thus, in *United States v. Kochersperger*,⁶ decided in 1860, we find the court saying: "No government has

⁴ Cf. Story, *Commentaries*, § 1123, for an argument sustaining these broader powers.

⁵ 127 U. S. 1.

⁶ 26 Fed. Cas. 803.

ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets.”

However, as the court went on to declare in that case, the mere existence of a governmental postal system does not imply the existence of a governmental monopoly. That exists only when there is statutory provision to that effect. This statutory provision has been made in the United States, and is now found in Sections 179 to 188 of the Penal Code of the United States.⁷ There have been a number of cases dealing with the question as to what specific practices constituted a carrying of mails, but, since they have involved no questions of a constitutional character, they do not warrant consideration here.⁸

§ 653. Power of the States to Exclude from Their Borders Objectionable Mail Matter.

It will be observed that the cases *Ex parte Jackson* and *In re Rapier*^{8a} go no further than to sustain the power of the United States to exclude from the mails matter which it deems objectionable. They do not decide that Congress may permit the sending into a State and the delivery therein of matter considered seditious, immoral, or otherwise objectionable by that State. This point has never been passed upon by the Supreme Court. It has, however, been debated in Congress and there is an opinion of the United States Attorney General Cushing⁹ that Congress has not this power. This opinion declares that while the Federal Government has full control, free from State interference, to regulate the transmission of the mails up to the time of their receipt by the postmaster of the office to which they are directed, the States may, in the exercise of their acknowledged police power, prevent their citizens from receiving incendiary or other matter which they deem objectionable.¹⁰

§ 654. States May Not Maintain Postal Agencies.

From the opinion rendered in the *Ex parte Jackson* and other cases, it would appear that the States are without the power to conduct postal operations over post-roads in competition or conflict with the United States, but that they may permit, or themselves provide for, the carrying of letters or merchandise in other ways, as, for instance, by express companies, and this too, with reference to material excluded by Congress from the mails as immoral, fraudulent, or otherwise objectionable. However, the distribu-

⁷ The constitutionality of prohibiting the establishment of private agencies for the carrying of mails was expressly affirmed in *United States v. Thompson* (28 Fed. Cas. No. 16, 489) (1846).

⁸ See *United States v. Erie R. Co.* (235 U. S. 335).

^{8a} See §§ 657 and 658.

⁹ 8 Cushing, *Opinions of Atty. Gen.*, 489.

¹⁰ *Cf.* Cong. Record, 53d Cong., 2d Sess., Appendix, Pt. I, pp. 3 *et seq.*

tion of matter treasonable to the United States or inciting resistance to its laws may not, of course, be authorized, nor may interstate commerce be regulated.

§ 655. Criminal Jurisdiction of the Federal Government under the Postal Power.

Under the well-established doctrine which is applicable to all its functions, the Federal Government has power to punish the violation of regulations which it has authority to issue. As regards its postal power, it has been held that this authorizes not only the penalizing of violations of all regulations regarding the safe and efficient carrying of the mails, but also the penalizing of the use of the mails for purposes which Congress deems to be contrary to public policy and good morals.¹¹ Thus in *Badders v. United States* ¹² it was held that the United States has the power to penalize the use of the mails in execution of a fraudulent scheme which the Federal Government had not the power to penalize as such. In this case will be found references to the other cases sustaining this doctrine. The court said: "Whatever the limits to the power, it [Congress] may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."

§ 656. Exclusion from the Mails: Extent of the Power.

In an earlier chapter the constitutional power of Congress to exclude persons or commodities from interstate commerce has been considered. In general it may be said that exclusion from the mails is more easily defended, and, perhaps, is more extensive than it is in the case of interstate commerce, unless it be held, as it has not yet been expressly and explicitly held, that the very right to engage in interstate commerce is a distinctively Federal right, that is, that it is of Federal origin and creation, and, therefore, may be granted or withheld upon such conditions as Congress may see fit to impose. The author is not acquainted with a case in which it has been held, in explicit terms, that the right to send or receive matter in or through the mails owes its existence to Federal law, but it is certain that, if such a right were to be deemed one existing independently of Federal action, it would be an absolutely empty and purely abstract one were it not for the postal facilities supplied and operated by the Federal Government. From the fact that, as regards the mails, the facilities for their transmission are exclusively supplied by the Federal Government itself, which is not the case with reference to interstate commerce, it might be argued that Congress may determine in a more arbitrary manner what shall and what shall not be carried in the mails than it constitutionally

¹¹ The validity of these regulations themselves for the use of the mails is discussed in another section.

¹² 240 U. S. 391.

can with regard to interstate commerce which it regulates rather than creates the right to engage in, and the instrumentalities for the carrying on of which it does not itself supply or operate.

However, in any case, it would seem that Congress, in exercising whatever power it may possess to exclude matter from the mails, is limited by those general limitations and prohibitions which, by the Federal Constitution, are placed upon the exercise of its enumerated powers by Congress. And thus there have arisen numerous cases in which there has been raised the question whether an exclusion from the mails, including the means provided for enforcing that exclusion, have not violated the prohibitions of the Constitution with reference to the denial of due process of law, the abridgement of freedom of speech and the press, the prohibition of unreasonable searches and seizures, etc. The principal of these cases are considered in the sections which follow.

§ 657. Exclusion from the Mails: Freedom of Press: Searches and Seizures. *Ex Parte Jackson*.

In *Ex parte Jackson*¹³ was questioned the constitutional power of Congress to exclude lottery tickets from the mails, and in determining this the court found it necessary to consider the general extent of the administrative control that might be exercised over the postal service, and especially the relation thereof to the constitutionally guaranteed immunity of the people to be secure against unreasonable searches and seizures, as well as their right to freedom of the press. In its opinion the court pointed out that, without constitutional objection having been made, the power vested in Congress "to establish post-offices and post-roads," had, from the beginning, been construed to authorize not only the designation of the routes over which the mail should be carried, the location of the offices wherein the mail matter should be received and distributed, the carriage of that matter, and the establishment of regulations providing for its safe and speedy transit and prompt delivery, but the determination of what matter should be carried, its classification, its weight and form, and the charges to be made. This right to designate what shall be carried, it was declared, carries with it the right to determine what shall be excluded.

However, the difficulty in this case arose not so much in establishing the power of Congress to exclude objectionable matter from the mails, as in upholding the power to provide measures for enforcing effectively the rules of exclusion which might be legislatively declared. For, obviously, the presence in the mails of the prescribed matter could be determined only by examination of the mail matter by the proper administrative officer, and the granting of such a right of examination, it was claimed, was in violation of constitutionally guaranteed rights of the people. The court

¹³ 96 U. S. 727.

said: "The difficulty attending the subject arises, not from the want of power in Congress to prescribe the regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter; between what is intended to be kept from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; ^{13a} and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution. Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation in any other way cannot be forbidden by Congress."

After calling attention to the fact that in 1836 the question of the power of Congress to exclude certain publications from the mails had been discussed in the Senate and that the prevailing view had been that Congress had not this power,¹⁴ the court continued: "Great reliance is placed by the

^{13a} The practice and the right, in time of war, would seem to be otherwise.

¹⁴ "In 1836, the question of the power of Congress to exclude publications from the mail was discussed in the Senate; and the prevailing opinion of its members, as expressed in debate, was against the existence of the power. President Jackson in his annual message of the previous year, had referred to the attempted circulation through the mails of inflammatory appeals, addressed to the passions of the slaves, in prints and in various publications, tending to stimulate them to insurrection; and suggested to Congress the propriety of passing a law prohibiting, under severe penalties, such circulation of 'incendiary publications' in the Southern States. In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman, and he made an elaborate report on the subject, in which he contended that it belonged to

petitioner upon these views, coming as they did in many instances, from men alike distinguished as jurists and statesmen. But it is evident that they were founded upon the assumption that it is competent for Congress to prohibit the transportation of newspapers and pamphlets over postal routes in any other way than by mail; and of course it would follow, that if with such a prohibition, the transportation in the mail could also be forbidden, the circulation of the documents would be destroyed, and a fatal blow given to the freedom of the press. But we do think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails.¹⁵ To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted—consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend. Whilst regulations excluding mat-

the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation. Whilst, therefore, condemning in the strongest terms the circulation of the publications, he insisted that Congress had not power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the liberty of the press. 'To understand,' he said, 'more fully the extent of the control which the right of prohibiting circulation through the mail would give to the government over the press, it must be borne in mind that the power of Congress over the post-office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post-road; and that by the act of 1825, 4 Stat. at L. 102, it is provided "That no stage, or other vehicle which regularly performs trips on a post-road, or on a road parallel to it shall carry letters." The same provision extends to packets, boats, or other vessels on navigable waters. Like provision may be extended to newspapers and pamphlets, which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectively control the freedom of the press than any sedition law, however severe its penalties.' Mr. Calhoun, at the same time, contended that when a State had pronounced certain publications to be dangerous to its peace, and prohibited their circulation, it was the duty of Congress to respect its laws and co-operate in their enforcement; and whilst, therefore, Congress could not prohibit the transmission of the incendiary documents through the mails, it could prevent their delivery by the postmasters in the States where their circulation was forbidden. In the discussion upon the bill reported by him, similar views against the power of Congress were expressed by other Senators, who did not concur in the opinion that the delivery of papers could be prevented when their transmission was permitted."

¹⁵ It is to be noted that, since the time when this statement was made, the court has sustained the right of Congress to exclude lottery tickets from interstate commerce.

ter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters and packages, or from agents depositing them in the post-office, or others cognizant of the facts. And as to the objectionable printed matter which is open to examination, the regulations may be enforced in a similar way, by the imposition of penalties for their violation through the courts, and, in some cases, by the direct action of the officers of the postal service. In many instances those officers can act upon their own inspection, and, from the nature of the case, must act without other proof; as where the postage is not prepaid, or where there is an excess of weight over the amount prescribed, or where the object is exposed, and shows unmistakably that it is prohibited, as in the case of an obscene picture or print. In such cases, no difficulty arises and no principle is violated in excluding the prohibited articles or refusing to forward them. The evidence respecting them is seen by everyone, and is in its nature conclusive. In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

§ 658. *Ex parte Rapier*.

In *Ex parte Rapier*¹⁶ it was again argued that Congress was without the constitutional power to forbid the use of the mails to lottery tickets, circulars, etc., but this time upon the ground that Congress was without the power to declare the lottery itself a criminal enterprise. "Where Congress cannot by direct legislation pronounce a business to be a crime and punish it as such," counsel argued, "it is not competent to Congress to determine it to be a crime, and to deprive it of the benefit of the mails for the sole purpose of endeavoring to suppress it." To this the court replied: "The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime and immorality. The argument

¹⁶ 143 U. S. 110.

that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses. We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

In *Lewis Publishing Co. v. Morgan* ¹⁷ was contested the constitutional right of Congress to provide that newspapers and periodicals should be denied the privileges of second-class matter, which include low postal rates, which did not publish sworn statements of their average circulation, the names of their editors, publishers, owners, principal stockholders, principal creditors, etc., and mark all paid reading matter as "advertisements." To the contention that these requirements constituted an infringement of the constitutionally guaranteed "freedom of the press," the court, after a careful examination of the power of Congress to classify mail under its general power to establish and operate a postal system, declared the requirements in question to be reasonable in character and therefore constitutional. The court said: "That Congress, in exerting its power concerning the mails, has the comprehensive right to classify which it has exerted from the beginning, and therefore may exercise its discretion for the purpose of furthering the public welfare as it understands it, we think it too clear for anything but statement; the exertion of the power, of course, at all times and under all conditions, being subject to the express or necessarily implied limitations of the Constitution. From this it results that it was and is in the power of

¹⁷ 229 U. S. 288.

Congress, in 'the interest of the dissemination of current intelligence,' to so legislate as to the mails by classification or otherwise, as to favor the widespread circulation of newspapers, periodicals, etc., even although the legislation on that subject, when considered intrinsically, apparently seriously discriminates against the public and in favor of newspapers, periodicals, etc., and their publishers. . . . This being true, the attack on the provision in question as a violation of the Constitution because infringing the freedom of the press, and depriving of property without due process of law, rests only upon the illegality of the conditions which the provision exacts in return for the right to enjoy the privileges and advantages of the second-class mail classification."

In *United States v. Burleson*¹⁸ will be found a full discussion of the authority that had been given, and constitutionally may be given, by Congress to the Postmaster General to exclude publications from the privileges of second-class mail matter, and the manner in which that authority may be exercised, as regards the hearing to be given to the parties concerned, and the grounds upon which the Postmaster General may base his orders of exclusion. In this case an order of exclusion was upheld, which had been issued after due notice and hearing, of a newspaper which, contrary to the provisions of the Espionage Act of June 15, 1917, had systematically contained false reports and false statements published with the intent to interfere with the success of the military operations of the Federal Government and to obstruct its recruiting and enlistment services. This exclusion, it was held, might apply not only to single issues but to all issues until, upon application for a renewal of the privileges of second-class mail matter, it should be shown that the newspaper was no longer publishing such false and prohibited statements. The court said: "It is a reasonable presumption that the character of the publication as one entitled to second-class privilege, when thus established, will continue to be substantially maintained, and therefore such a permit is made applicable to the indefinite future. For the same reason, and because it would not be practicable to examine each issue of a newspaper, the revocation of a permit must continue until further order. Government is a practical institution, adopted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country to approve in advance each issue before it should be allowed to enter the mails, and when, for more than five months, a paper had contained, almost daily, articles which, under the express terms of the statute, rendered it 'non-mailable,' it was reasonable to conclude that it would continue its disloyal publications, and it was therefore clearly within the power given to the Postmaster General by Rev. Stat. 396, 'to execute all laws relating to the postal service,' to enter, as was done in this case, an order suspending the

¹⁸ 255 U. S. 407.

privilege until a proper application and showing should be made for its renewal." ¹⁹

§ 659. Fraud Orders.

These orders for the regulation of the mails will be later considered in connection with discussion of Due Process of Law.²⁰

§ 660. Protection of the Mails: In *Re Debs*.

In *Re Debs* ²¹ was presented the question whether, for the protection of the mails, as well as of interstate commerce, the Federal Government may, by the use of judicial restraining orders or the employment of its armed forces, prevent interference, or whether it is obliged to wait until there has been such interference, and then punish the guilty ones in its courts. The court held that the former as well as the latter means are open to it.²²

§ 660a. Police Power of the States and the Postal System.

Not a few cases have arisen which have involved the extent to which the States, in the exercise of their legitimate police powers, may interfere with or control the operations of the Federal postal system. In a very early case it was held that a municipal corporation might punish a mail carrier for driving recklessly through crowded streets.²³

¹⁹ Justices Brandeis and Holmes dissented, the former in an elaborate opinion.

²⁰ § 1100.

²¹ 158 U. S. 564.

²² "Doubtless, it is within the competency of Congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictments in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: 'The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed.' If all the inhabitants of the State, or even a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State. But there is no such impotency in the National Government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

²³ *United States v. Hart* (1 Peters C. C. 390) (1817). In 1852 the Attorney General of the United States advised that it was constitutional for a city to prohibit railroads

The police provisions of the States, to be valid, must be reasonable in character, and, of course, not directed in any discriminating way against the operations of the postal system. Thus, in *Illinois Central R. Co. v. Illinois*,²⁴ the Supreme Court held invalid, as an unconstitutional interference with both interstate commerce and the carrying of the mails, a State law which required interstate trains to deviate from their direct routes in order to pass through certain places. The court said: "It may well be, as held by the courts of Illinois, that the arrangements made by the company with the Post Office Department of the United States cannot have the effect of abrogating a reasonable police regulation of the State. But a statute of the State, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation."²⁵

It would appear that the States may not directly interfere with the carrying of the mails even for the purpose of obtaining execution of writs which have been legally issued. Thus, while it was held in a United States Circuit Court that such a writ might be served upon a carrier of the mails since this did not detain him,²⁶ it was held in another case that horses employed in carrying the mails could not be stopped and seized in execution of a lien.²⁷

However, in *United States v. Kirby*,²⁸ the Supreme Court held that a carrier of the mails might be arrested and detained upon a State indictment for murder. After asserting that the Federal statute forbidding interference with the mails had no application to acts under State authority which were lawful in themselves and which caused only a temporary impediment to the mails, the court said: "No officer or employee of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the form prescribed by the Constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is far less than that which would arise from the extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted

from running at a faster rate than six miles an hour within the city's limits, even though the mails might be thereby delayed. He said: "When such regulations are fairly and discreetly made with intent to preserve the peace, safety and well-being of the inhabitants of the city, they may be said to flow from powers necessary and proper in themselves, which the act of Congress does not intend to take away or impugn." (5 Op. Atty. Gen. 554.) Cf. *Rogers, The Postal Power of Congress*, p. 131.

²⁴ 163 U. S. 142.

²⁵ See also *Mississippi R. Com. v. Illinois Central R. Co.* (203 U. S. 335).

²⁶ *United States v. Harvey* (8 Law Rep. 77).

²⁷ *United States v. Barney* (3 Hughes Rep. 544).

²⁸ 7 Wall. 482.

whether it is competent for Congress to exempt the employees of the United States from arrests in criminal processes from the State courts and when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language."

In *United States v. Sears*²⁹ it was held that a mail wagon might not be stopped in order to compel it to pay tolls, the court saying: "It is not the right of the company to the tolls under the State law which is doubted, but the right to stop the passage of the mails to enforce their collection which is denied."

Professor Rogers in his study, *The Postal Power of Congress*,³⁰ discusses the constitutional question presented when a Federal postal agent, in the discharge of duties imposed upon him by the Federal law, violates the criminal laws of a State. This question at one time gave rise to extended discussion in connection with the laws of certain of the States prohibiting the possession or distribution of writings or publications which those States deemed incendiary or otherwise pernicious. This controversy did not reach the courts, but it led to the rendition of an interesting opinion by Cushing, Attorney General of the United States,³¹ and also one by John Randolph Tucker, Attorney General of the State of Virginia. In Mr. Tucker's memorandum or opinion he stated the proposition that the Federal power over the mails ceased when the mail matter reached the point of reception, and that then the State authority began and was exclusive, with the result that each State might determine whether the mailed matter should be delivered to the persons in the State to whom it was addressed, and that a postmaster violating State laws as to this could not plead a justification derived from the Federal Constitution or Federal laws. This doctrine was approved by Postmaster General Holt. It would seem clear, however, that this doctrine was not a sound one, since the delivery of mail matter to the addressee is obviously an integral part of Federal postal service, and, as such, could not, constitutionally, be directly interfered with any under State authority. The fact that the doctrine should have been declared and should have met with any acceptance is explainable, as Professor Rogers points out, only by the fact that, at the time it was declared, the absolute supremacy of Federal over State authority had not been so clearly stated and enforced as it later came to be.³²

However, though it is clear that a State may not constitutionally forbid or punish the receiving by persons in the State of mail matter the trans-

²⁹ 55 Fed. Rep. 268.

³⁰ Pp. 136 *et seq.*

³¹ 8 Op. Atty. Gen., 489 (1857).

³² See, for example, *Ex parte Siebold* (100 U. S. 257), decided in 1879.

mission of which is legal under Federal law, it is possible to argue that the States may forbid and penalize the possession by the individual of such matter, which, because of its intrinsic character, the State may reasonably judge to be prejudicial to the peace, safety, or welfare of its citizens or of itself. Professor Rogers seems to think that such a position is a valid one, but the present writer is of opinion that, should the question reach the Supreme Court, that tribunal would hold that the Federal right to receive would be unconstitutionally impaired or denied should a State attempt to declare that, unless the receiver of the mail matter should, immediately after receipt thereof, dispossess himself of the matter, he might be held criminally liable. It is the belief of the writer that the States may constitutionally, so far as the Federal postal power is concerned,³³ prohibit the receiver of mail matter from transferring it to other persons, or transporting it, or making other objectionable use of it, but that this is as far as State authority should be construed to extend. By analogy, considerable light is thrown upon this point by the attitude of the courts towards the receipt of intoxicating liquors brought into the State in interstate commerce.

Although a State may not penalize or otherwise interfere with the exercise or enjoyment of postal rights, because these are Federal in character, it is reasonably clear that a person accused of a violation of a valid State criminal law cannot secure immunity upon the ground that the means, or one of the means, whereby the act charged against him was committed, was the use of the United States mails. Thus, in a case in which the defendant was charged with soliciting orders for intoxicating liquors in violation of the law of the State, the Federal Circuit Court of Appeals said: "It makes no difference that the United States mail was used for the solicitation. The Federal Government does not protect those who use its mails to thwart the police regulations of a State made for the conservation of the welfare of its citizens. The use of the mails is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses." ³⁴

³³ That is, if the State law was valid as a reasonable police regulation.

³⁴ *West Va. v. Adams Exp. Co.* (219 Fed. 794).

CHAPTER LXIII

PATENTS AND COPYRIGHTS

§ 661. Patents.

Congress is given the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The granting by the United States of a patent right does not give to the patentee the authority to exercise it in a State in violation of the police laws of that State.

In *Patterson v. Kentucky*¹ the court said: "The right which the patentee or his assignee possesses in the property, created by the application of a patented discovery, must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few. The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright of the map itself. . . . The right to sell . . . was not derived from the patent; that right existed before the patent, and, unless prohibited by valid local laws, could have been exercised without the grant of letters patent. The right which the patent primarily secures is the exclusive right in the discovery, which is an incorporeal right. . . . The enjoyment of that incorporeal right may be secured and protected by national authority against all hostile State legislation; but the tangible property which comes into existence by the application of the discovery is not beyond the control, as to its use, of State legislation, simply because the inventor acquires a monopoly in the discovery."

Applying the principles of the *Patterson v. Kentucky* case the court in *Webber v. Virginia*² sustained the power of the State to require the payment of a license fee for the sale of sewing machines, even though these machines were manufactured under a United States patent.³

The relation of the taxing and other powers of the States to patent rights granted by the United States is elsewhere discussed.

¹ 97 U. S. 501.

² 103 U. S. 334.

³ See also *Allen v. Riley* (203 U. S. 347).

§ 662. Non-Use of Patents.

It seems to be established that a patentee, in order to retain the rights granted him, is not compelled to make use of these rights. That he would be so compelled was stated by lower Federal courts in *Hoe v. Knapp*,⁴ and *Evart Manufacturing Co. v. Baldwin Cycle-Chain Co.*,⁵ but, in *Heaton-Peninsula Button Fastener Co. v. Eureka Specialty Co.*⁶ a Circuit Court of Appeals held that use of the patent by the patentee was not necessary; and the same ruling was made by another Circuit Court of Appeals in *Continental Paper Box Co. v. Eastern Paper Bag Co.*,⁷ and, upon appeal, the judgment in this latter case was affirmed by the Supreme Court. In its opinion the Supreme Court pointed out that, by the patent laws, there was no qualification in this respect placed upon the rights to be enjoyed by the patentee, and that none should be assumed. Reference was also made to the case of *United States v. American Bell Telephone Co.*⁸ in which the court had said: "Counsel seems to argue that one who has made an invention and thereupon applies for a patent therefor occupies, as it were, the position of a quasi-trustee for the public: that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention."

In *E. Bement & Sons v. National Harrow Co.*⁹ the court said: "If he [a patentee] see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own . . . his title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe v. Knapp*, 27 Fed. 204, is not supported by reason or authority."

Generally speaking, controversies growing out of or relating to patents, except as regards infringements or the nature and scope of patent rights, are not suits maintainable in Federal courts under patent laws.¹⁰ They fall under the general common or statute law of the States.

⁴ 217 Fed. Rep. 204.

⁵ 91 Fed. Rep. 262.

⁶ 77 Fed. Rep. 288.

⁷ 150 Fed. Rep. 741

⁸ 167 U. S. 249.

⁹ 186 U. S. 70.

¹⁰ *Wilson v. Sandford* (10 How. 92); *Hartell v. Tilghman* (99 U. S. 547); *Briggs v. United Shoe Machinery Co.* (239 U. S. 48); *Luckett v. Delpark* (270 U. S. 496).

§ 663. Right of Patentees to Restrict Resale Price and Use of Patented Articles.

This question is discussed in another chapter in which the bearing of the legal monopolistic rights granted to patentees upon the prohibitions of the Anti-Trust Acts is considered.¹¹

§ 664. States May Not Tax Royalties for Use of Patents Issued by the United States.

In *Long v. Rockwood*¹² it was held that the States may not tax royalties for the use of patents issued by the United States, since, to do so, it was declared, would be to interfere with the exercise of a Federal right or instrumentality.

§ 665. Trade-Marks.

The first attempt upon the part of the Federal Government to provide for the registration of trade-marks was in 1870 when Congress enacted a law¹³ entitled "An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights," which provided that persons who had established by usage an exclusive right to a device in the nature of a trade-mark might register it in the Patent Office, and that other persons using devices thus registered, without the consent of their owners, could be subject to civil suit for damages. By act of 1876¹⁴ it was provided that the fraudulent use, sale or counterfeiting of such registered trade-marks could be punished by fine or imprisonment.

In *United States v. Steffens*¹⁵ it was held that these laws could not be upheld as the exercise of a power granted to the United States by Article I, section 8, clause 8 of the Constitution "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries," nor could they be validated as a regulation of interstate and foreign commerce or commerce with the Indian tribes unless their application were limited to such commerce. Not being thus limited, the acts were held void.

The court, in its opinion, pointed out that though the right to adopt and use trade-marks had long been recognized by the common law as a property right which was entitled to legal protection, the right itself was not an express creation of law, but was one that was created by usage, and, as such, depended for its protection upon the laws of the States and was not a subject of legislation by Congress unless its power in the premises could be derived from some provision of the Federal Constitution. "Any attempt, however," said the court, "to identify the essential characteristics of a

¹¹ See Chapter XLVIII.

¹² 277 U. S. 142.

¹³ 100 U. S. 82. See also *United Drug Co. v. Rectanus Co.* (248 U. S. 90).

¹³ 16 Stat. at L. 198.

¹⁴ 19 Stat. at L. 141.

trade-mark with inventions and discoveries in the arts and sciences, or with the writing of authors, will show that the effort is surrounded with insurmountable difficulties. The ordinary trade-mark has no necessary relation to invention or discovery. . . . If we should endeavor to classify it, under the head of writings of authors, the objections are equally strong. . . . The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings and the like. . . . It [the trade-mark] requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation."

The act of 1870 having been held invalid, Congress, in 1881, passed a new law, since superseded by the law of 1905,¹⁶ which, as subsequently amended, is now in force, and which is expressly confined in its operation to foreign and interstate commerce and commerce with Indian tribes. The act does not pretend to create a property right in, or to, trade-marks, but provides that those persons who do register them may sue in the Federal courts for damages in case of the unauthorized use by others of their registered trade-marks, or to prevent the importation of goods bearing an infringing trade-mark.¹⁷

§ 666. Copyrights.

A copyright, as distinguished from a trade-mark, is wholly a creation of Federal statute; and such rights as it carries are wholly dependent upon such legislation. This has not been questioned since the decision of the court in *Wheaton v. Peters*.¹⁸ The only questions, then, which have arisen relating to copyrights have been those of statutory construction, and as to what materials are susceptible of being copyrighted. In *Kalem v. Harper Bros.*¹⁹ it was held that the provision of the law giving to authors the exclusive right to dramatize any of their works was valid as to pantomime exhibitions by means of moving-picture films.

In *Higgins v. Keuffel* ²⁰ it was held that a mere label might not be copyrighted. "To be entitled to a copyright," the court declared, "the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

Little v. Gould ²¹ is the authority for the doctrine that, in the absence of congressional regulation, a State may afford protection to literary productions.

¹⁶ 21 Stat. at L. 502; 33 Stat. at L. 724; 36 Stat. at L. 918; 37 Stat. at L. 649.

¹⁷ For an excellent statement of the present Federal law as now operative, see the article "Trade-Marks and the United States Patent Office," by Karl Fenning, Assistant Commissioner of Patents, in *XI American Bar Association Journal*, 461.

¹⁸ 8 Pet. 591.

¹⁹ 222 U. S. 55.

²⁰ 140 U. S. 428.

²¹ 2 Blatchf. 165.

CHAPTER LXIV

EXPRESS CONSTITUTIONAL LIMITATIONS UPON THE FEDERAL GOVERNMENT WITH REFERENCE TO THE DEFINITION AND PUNISHMENT OF CRIMES

§ 667. Express and Implied Limitations.

The essential nature of the American Federal system as provided for by the Constitution carries with it the general limitation upon the Federal Government that it can rightfully exercise only those powers which have been expressly granted to it, or which are implied as "necessary and proper" for carrying into execution those which have been thus expressly granted. In addition, however, to this general limitation, the Constitution and the Amendments thereto contain a considerable number of express limitations upon Federal authority either by way of prohibiting the doing of specific things, or by way of limiting the way in which certain of the specifically granted powers may be exercised. There also exist, as has been earlier referred to,¹ implied limitations upon Federal authority deducible from the specific limitations or from the general nature of the American Union in much the same way that the implied powers of the Union are deducible.

Certain of these limitations, express or implied, thus imposed, operate as an absolute denial to Congress of a legislative power with reference to the subjects specified, without regard to time or place. Others of these limitations, as was held in the Insular cases, serve to restrain the legislative powers of Congress only when dealing with the States and incorporated territories.²

¹ *Ante* § 68.

² "There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States' it goes to the competency of Congress to pass a bill that of description. Perhaps the same remark may be applied to the First Amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight Amendments is of general and how far of local application. Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' by which term we understand

Many of the limitations expressly laid upon the Federal Government by the Constitution have been or will be discussed in connection with the express powers to which they relate. Those relating to certain subjects, such as due process of law, the equal protection of the laws, freedom of speech and press, etc., will, because of their importance, be discussed in separate chapters. The present chapter will deal with the constitutional limitations under which the Federal Government operates with reference to the definition and punishment of crimes.

Generally speaking, the Federal Government, because one of limited powers, has no constitutional right to define or provide for the punishment of crimes except in so far as this may be a proper and necessary means of carrying into effect the powers which are vested in itself, including, of course, its authority to protect itself and to protect individuals against the violation of their Federal rights against action by other individuals or by the States of the Union. However, by way of exception, or perhaps for reasons of especial caution, the Constitution grants to Congress the authority to define and provide for the punishment of felonies and piracies on the high seas, and to punish treason against itself;³ but what shall be deemed to constitute this treason the Constitution itself defines. Furthermore, as will presently be discussed, it is declared that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. Congress is also expressly authorized to punish counterfeiting the securities and current coin of the United States.

§ 668. Piracies and Felonies on the High Seas: Definition and Punishment of.

By Article I, Section 8, Clause 10 of the Constitution Congress is given the power "To define and punish piracies and felonies committed on the

the States whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them. . . . We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, suffrage (*Minor v. Happersett*, 21 Wall. 162), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals." Justice Brown in *Downes v. Bidwell* (182 U. S. 244).

³ Art. I, § 8, Cl. 10; Art. III, § 3.

high seas." Had this power not been expressly given it would probably have been deduced as an implied power from the admiralty and maritime jurisdiction of the United States, or from its general jurisdiction in matters of international concern, or, in part at least, from its right to regulate foreign commerce.

As regards both piracies and felonies on the high seas it is to be observed that the authority is granted not only to punish but to define, and, in pursuance of this authority, Congress has denominated as piracies a considerable number of acts,⁴ and, among them, some, as, for example, the slave trade,⁵ which are not so denominated by the general principles of international law.⁶ The act declaring slave trade to be piracy was declared constitutional in *United States v. Bates*⁷ and its validity has not been since questioned.

The term "high seas" has been construed to cover any waters on the sea coast beyond the low-water mark, even though within a roadstead or bay which is within the territorial jurisdiction of another State. In this respect, as is pointed out in *United States v. The Pirates*,⁸ the delimitation of foreign jurisdictional limits in the case of piracies is not the same as that which determines belligerency or neutrality in time of war.⁹

§ 669. Offences against the Law of Nations.

In the same clause of the Constitution in which the Congress is authorized to define and punish piracies and felonies committed on the high seas, authority is given to define and punish "offenses against the law of nations." The use of the term "law of nations" is of significance since it gives constitutional recognition to the existence of such a body of laws, and implies an obligation upon the part of the United States to punish criminal violations of its provisions. It would seem, although there are no clear decisions of the Supreme Court upon this point, that, although Congress is given a general authority to define as well as to punish, it may not rely upon this grant for

⁴ See Chapter 12 of the Federal Criminal Code.

⁵ See Chapter 10 of the Federal Criminal Code.

⁶ "Piracy under the law of nations is a robbery or forcible depredation on the high seas without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility." *Cyclopedia of Law and Procedure*, vol. 30, p. 1627.

⁷ 24 Fed. Cas. No. 14,544.

⁸ 5 Wheat. 184.

⁹ The court said: "We are of opinion that a vessel in an open road may well be found by a jury to be on the high seas. It is historically known, that in prosecuting trade with many places, vessels lie at anchor in open situations (and especially where the trade winds blow) under the lee of the land. Such vessels are neither in a river, haven, basin or bay, and are nowhere, unless it be on the seas. Being at anchor is immaterial, for this might happen in a thousand places in the open ocean, as on the Banks of Newfoundland. Nor can it be objected that it was within the jurisdictional limits of a foreign State, for those limits, though neutral to war, are not neutral to crime."

authority to include within the Federal criminal jurisdiction offences which cannot be fairly said to be within the purview of what is commonly known as international law or the law of nations.

The authority given to Congress to define and punish all offences against the law of nations would seem to be broad enough to authorize the prohibition and punishment of acts which, though committed within the territorial limits of the several States, may give rise to international responsibilities upon the part of the United States. It would also seem that this authority may be implied from the general fact that to the Federal Government is given the exclusive control of foreign relations, and that to it alone foreign States look for the redress of any injuries which they may conceive themselves to have suffered. Where the responsibility is imposed, the right to prevent its accruing may properly be implied.

A most interesting case upon this point is that of *United States v. Arjona*¹⁰ in which was questioned the constitutionality of the law of Congress defining as a crime the counterfeiting within the United States of the notes, bonds, and other securities of foreign governments. The authority for this act could not be found in Article I, Section 8, Clause 6, for that relates only to the securities and current coin of the United States. Therefore, in sustaining its validity the court was obliged to have recourse to the authority to punish offences against the law of nations and to the general control which the Federal Government has over all matters that pertain to or may involve international rights and responsibilities.¹¹ In his opinion in this case Chief Justice Waite, after referring to various provisions of the Constitution relating to matters of international concern, said: "The National Government is in this way made responsible to foreign Nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized 'to define and punish . . . offenses against the law of nations.' The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another Nation with which it is at peace, or to the people thereof; and because of this the obligation of one Nation to punish those who, within its own jurisdiction, counterfeit the money of another nation, has long been recognized." And, later in the same opinion: "A right secured by the law of nations to a nation or its people, is one the United States as the representatives of this nation are bound¹² to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States

¹⁰ 120 U. S. 479.

¹¹ Cf. U. S. Rev. Stat., Title XLVII.

¹² Morally bound, is almost surely meant.

to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another Nation and which the law of nations has imposed on them as part of their international obligations."

§ 670. Treason.

The power of Congress with reference to both the definition and punishment of treason is limited by Section 3 of Article III of the Constitution. The three clauses of this section provide as follows:

"Treason against the United States shall consist in levying war against them, in adhering to their enemies, giving them aid and comfort."

"No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

"The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."¹³

The purpose of these provisions is to exclude the possibility of the Federal Government, through either its judicial or legislative branches, following the precedents of English law and practice, and declaring a great variety of acts to constitute treason and punishable as such.

Following in the main the words of the Constitution Congress has by statute declared that "whoever, owing allegiance to the United States levies war against them, or adheres to their enemies giving them aid and comfort within the United States or elsewhere, is guilty of treason."¹⁴

§ 671. May Be Committed by Aliens.

Treason is a breach of allegiance, and it will be observed that the statute restricts the definition of the offence to persons owing allegiance to the United States.

This allegiance may be one of full citizenship, or one based upon the presence of an alien, and the commission of the treasonable act within the territorial limits of the United States. In an earlier chapter it has been pointed out that an alien within the territorial limits of a State, whether domiciled there or not, owes for the time being a qualified allegiance to that State. He enjoys the protection of its laws, and may be guilty of treason if he wages war against or gives comfort or aid to the enemies of that sovereignty.^{14a}

¹³ Art. III, Sec. III.

¹⁴ 35 Stat. at L., chap. 321, p. 1088, § 1 (Criminal Code). The phraseology of section 5331 of the Rev. Stat. is here slightly changed. By section 2, the punishment for treason is fixed at death, or, at the discretion of the court, imprisonment at hard labor for not less than four years, and a fine of not less than ten thousand dollars, and disqualification from holding office under the United States.

^{14a} *Carlisle v. United States* (16 Wall. 147); *Radich v. Hutchins* (95 U. S. 210).

In *Radich v. Hutchins* ¹⁵ the court said: "If at the time the transaction took place, which has given rise to the present action, the plaintiff was a subject of the Emperor of Russia, as he alleges, that fact cannot affect the decision of the case, or any question presented for our consideration. He was then a resident of the State of Texas, and engaged in business there. As a foreigner domiciled in the country, he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent States. The law on this subject is well settled and universally recognized."

§ 672. Domicile Not Necessary.

In the case last cited the alien was domiciled in the United States, but it would not appear that domiciliation is necessary as a basis for holding the alien liable for treason, if the act of treason be committed within the territorial jurisdiction of the United States. If the act be committed by the alien outside of such jurisdiction, no treason can be alleged.¹⁶

§ 673. No Distinction in United States between High and Petit Treason.

The distinction between "high" and "petit" treason is not known to American constitutional law.¹⁷ Or rather, under our law, petit treason no longer exists. It is now simply murder or manslaughter.

§ 674. Misprision of Treason.

Misprision of treason is defined and its punishment provided for by Section 5333 of the Revised Statutes.¹⁸

The constitutionality of this provision was considered and not questioned in *United States v. Wiltberger*.¹⁹

§ 675. What Constitutes Treason.

By the definition of the Constitution treason to the United States may be charged only in cases where the accused has levied war against the United

¹⁵ 95 U. S. 210.

¹⁶ *United States v. Villato* (2 Dall. 370).

¹⁷ Statute 25 Edw. III defines petit treason as the killing of a husband by a wife, of a master by his servant, or of a prelate by an ecclesiastic owing obedience to him.

¹⁸ "Whoever owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals, and does not, as soon as may be, disclose and make known the same to the President, or to some judge of the United States, or to the governor, or to some judge or justice of a particular State, is guilty of misprision, and shall be imprisoned not more than seven years, and fined not more than one thousand dollars." Sec. 2, Chap. 321, 35 Stat. at L. 1088, act March 2, 1909.

¹⁹ 5 Wh. 76.

States, adhered to its enemies, or given them aid and comfort; and, for conviction, there must have been an overt act.

The distinction between a mere riot, or resistance to the execution of a law, and treason is not always easy to draw, but in general the authorities hold that the resistance to public authority, in order to constitute a levying of war and, therefore, treason, must amount to an effort directly to overthrow the government, or to prevent a law from being executed not simply in a particular instance, but generally.

Thus in *United States v. Mitchell*²⁰ it was held by a Federal court that an insurrection of armed men, the object of which was to suppress the excise offices and to prevent by force and intimidation the execution of an act of Congress, was a levying of war, and, as such, treason. Upon the other hand, it was held in *United States v. Hoxie*²¹ that if the resistance offered to the execution of the law had no public purpose in view, treason was not committed, however great the degree of force employed.

§ 676. Enlistment of Men Does Not Amount to Levying War.

The most careful consideration of the definition of treason by the Supreme Court is that given in *Ex parte Bollman*.²² Chief Justice Marshall said in his opinion in that case: "To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied. It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an ac-

²⁰ 2 Dall. 348. See also the case of *Vigal*, 2 Dall. 346, and that of *William Fries*, 3 Dall. 515.

²¹ 1 Paine (U. S.), 265.

²² 4 Cr. 75.

tual assembling of men for the treasonable purpose, to constitute a levying of war. Crimes so atrocious as those which have for their object the subversion by violence of those laws and institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe as well as more consonant to the principles of our Constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide. To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.”²³

²³ In *Homestead Treason* case (1 Dist. Rep. [Pa.] 785), the court, charging the jury, said: “When a large number of men arm and organize themselves by divisions and companies, appoint officers, and engage in a common purpose to defy the law and resist its officers, and to deprive any portion of their fellow-citizens of the right to which they are entitled under the Constitution and the laws, it is a levying of war against the State, and the offense is treason. Much more so when the functions of the State government are usurped in a particular locality, the process of the Commonwealth and the lawful acts of its officers resisted, and unlawful arrests made at the dictation of a body of men, who have assumed the functions of government in that locality. It is a state of war when a business plant has to be surrounded by the army of the State for weeks to protect it from unlawful violence at the hands of men formerly employed in it. Where a body of men have organized for a treasonable purpose, every step taken is an overt act of treason in levying war.”

Justice Story in a charge to the jury in the United States Circuit Court, in 1842 (1 Story, 615), said: “A conspiracy to levy war, and an actual levy of war, are distinct offenses. To constitute an actual levy of war, there must be an assembly of persons

§ 677. Burr Trial.

In the famous trial of Aaron Burr for treason, over which Chief Justice Marshall presided, the verdict of acquittal was practically dictated by a ruling of Marshall that not only was it necessary that the overt act, which, in this case, was the gathering on Blennerhassett's Island, be held to be a levying of war, and proved by at least two witnesses, but also that Burr, who was not present at that gathering, be shown by two witnesses to have committed an overt act with the intent and purpose of procuring such a treasonable assembling on the Island, that is, that Burr was directly connected therewith. This ruling seems scarcely consistent with Marshall's own words in the Bollmann case, and it is doubtful whether, should the point again arise, the courts would reaffirm it. It is more reasonable to ex-

met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. If the assembly is arrayed in a military manner, if they are armed and march in a military form, for the express purpose of overawing or intimidating the public, and thus they intend to carry into effect the treasonable design, that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place." And further, "In respect to the treasonable design, it is not necessary that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government in its sovereign capacity. Thus, if there is an assembly of persons with force, with intent to prevent the collection of the lawful taxes or duties levied by the government, or to destroy all custom-houses or to resist the administration of justice in the courts of the United States, and they proceed to execute their purpose by force, there can be no doubt that it would be treason against the United States. . . . If the object of an assembly of persons, met with force, is to overturn the government or constitution of a State, or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws, but without any intention whatsoever to intermeddle with the relations of that State with the National Government, or to displace the national laws or sovereignty therein, every overt act done with force towards the execution of such a treasonable purpose is treason against the State only. But treason may be begun against a State, and may be mixed up or merged in treason against the United States. Thus, if the treasonable purpose be to overthrow the government of the State, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the State, that would be treason against the United States. So, if the troops of the United States should be called out by the President, in pursuance of the duty enjoined by the Constitution, . . . and there should be an assembly of persons with force to resist and oppose the troops so called out by the President, that would be a levy of war against the United States although the primary intention of the insurgents may have been only the overthrow of the state government or the state laws."

For further definitions of what constitutes "adhering to their enemies," and "giving them aid and comfort," see *United States v. Burr* (2 Burr's Trial, 405); *United States v. Pryor* (3 Wash. 234); *United States v. Greathouse* (2 Abb. C. C. 364); *United States v. Greiner* (4 Phila. 396); Wharton, *State Trials* 102ff.

pect that, in its place, it would be ruled that, in matters of treason, all participants are principals, and that an accused's connection with an assembling which amounts to a levying of war and therefore to treason may be proved by the evidence deemed sufficient in ordinary criminal cases.²⁴ In this connection it may be observed that by the Espionage Act of June 15, 1917,²⁵ Congress has rendered severely punishable acts which are essentially treasonable in character, but which are not denominated as "Treason," and the proof of which is not obliged to satisfy the constitutional requirements in trials for treason; and, furthermore, that by Title I, section 4 of this act it is expressly provided that "If two or more persons conspire to violate the provisions of Section two or three of this Title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy."

§ 678. Adhering to Enemies, Giving Them Aid and Comfort.

As to what constitutes adhering to enemies of the United States, giving them aid and comfort, the courts have found as much difficulty in determining as they have had in determining what constitutes a levying of war. In general, however, as summed up by "Cyc," they have construed these constitutional words "to clearly include such acts as furnishing the enemy with arms, troops, supplies, information, or means of transportation,"²⁶ and to include in a general way any act indicating disloyalty and sympathy with the enemy, and which is directly in furtherance of their hostile designs, regardless of whether the motive prompting the act is merely sympathy or pecuniary gain.²⁷ It seems, however, that it is not essential that the effort to aid be successful, provided overt acts are done which, if successful, would have advanced the interests of the enemy."²⁸

²⁴ For an excellent criticism of Marshall's ruling in the Burr trial see Professor E. S. Corwin's *John Marshall and the Constitution*, Chap. IV. With regard to the gathering on Blennerhassett's Island it is to be noted that there was no certain proof that the purpose was to levy war against the United States, since there was the possibility that the men were gathered in execution of a scheme to colonize Texas.

²⁵ 40 Stat. at L. 217.

²⁶ Citing *Hanauer v. Doane* (12 Wall. 342); *In re Charge to Grand Jury* (30 Fed. Cas. No. 18,270); *In re Charge to Grand Jury* (30 Fed. Cas. No. 18,272); *United States v. Greathouse* (26 Fed. Cas. No. 15,254).

²⁷ Citing *In re Charge to Grand Jury* (30 Fed. Cas. No. 18,272); *United States v. Hodges* (26 Fed. Cas. No. 15,374).

²⁸ Citing *United States v. Greathouse* (26 Fed. Cas. No. 15,254).

For a general discussion of both English and American cases dealing with adhering and giving aid and comfort to the enemy, see the excellent articles of Mr. Hayes McKinney entitled "Treason under the Constitution of the United States" in *12 Illinois Law Review*, 381 (January, 1918); and that by Mr. Charles Warren, entitled "What is Giving Aid and Comfort to the Enemy?" in the *Yale Law Journal*, January, 1918.

It scarcely needs be pointed out that the offences of adhering to the enemies of the United States or the giving to them of aid and comfort which constitutes treason may be committed in cases in which there is no levying of war against the United States. Thus, to give instances cited by Mr. Warren in the article to which reference has been made, treason is committed by enlistment in the United States to serve in the force of a foreign enemy; the selling of goods to or buying of goods from the enemy government or to or from its agents or forces,²⁹ by communicating intelligence of military value to the enemy,³⁰ delivering up prisoners and deserters to the enemy;³¹ all acts which in any way tend or are intended to obstruct or weaken the military operations of the United States; the advising or inciting of others to give aid or comfort to the enemy.³²

§ 679. Treason and the Civil War.

The fact that, during the American Civil War, the Confederates were recognized by the United States as belligerents and the war as a public one, did not carry with it a "recognition" of the Confederate Government such as would carry with it an estoppel upon the part of the United States to treat as traitors those who gave aid and comfort to the Confederate Government or served in its military forces. Upon the contrary, the United States continued to assert its right to treat as traitors those who gave support to the Southern Cause.

In 1862, Congress passed an act entitled "An Act to Suppress Insurrection; to Punish Treason and Rebellion, and Seize and Confiscate the Property of Rebels, and for other Purposes."³³ However, notwithstanding its

²⁹ *Sprott v. United States* (20 Wall. 459); *Hanauer v. Doane* (12 Wall. 342); *Young v. United States* (97 U. S. 39); *People v. Lynch* (11 Johns. 549).

³⁰ Charge to Grand Jury (30 Fed. Cas. No. 18,272).

³¹ *United States v. Hodges* (26 Fed. Cas. No. 15,374).

³² 30 Fed. Cas. No. 18,272.

³³ 12 Stat. at L. 509. Prior to this Congress had enacted the Conspiracies Act of July 31, 1861 (12 Stat. at L. 284) dealing with offences of a treasonable nature but, in some cases at least, not coming within the strict definition of treason as given in the Constitution. The act was a short one, of but a single paragraph, and may be quoted.

"If two or more persons within any State or Territory of the United States shall conspire to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States; each and every person so offending shall be guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States having jurisdiction thereof, or district or supreme court of any Territory of the United States having jurisdiction thereof, shall be punished by a fine not less than five hundred dollars and not more than five

title, the section of the act dealing with the matter of rebellion against the United States, does not designate the offence connected therewith as treason.³⁴

That the United States deemed that those who had served in the Confederate forces or who had given their allegiance and support to the Confederate Government might be punished as traitors was shown in the numerous indictments for treason brought against such. During the war it was not considered politic to press these indictments to their ultimate issue because of fear of reprisals on the part of the Confederate authorities, but, at the conclusion of war, hundreds, indeed thousands, of such indictments were returned. However, these were not pushed to trial, although there were many persons who urged that at least the leaders of the Rebellion should be punished as traitors.³⁵

In *Thorington v. Smith* ³⁶ the court declared that the Confederate Government had not obtained a status which would relieve its supporters from a charge of treason. The court said: "There are several degrees of what is called *de facto* government. Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason. . . . It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* Government in this sense."

In *Sprott v. United States*,³⁷ the court declared: "The Government of the

thousand dollars; or by imprisonment, with or without hard labor, as the court shall determine, for a period not less than six months nor greater than six years, or by both such fine and imprisonment."

This act has remained upon the statute books and was availed of by the United States authorities during the World War.

³⁴ Section 2 of the act read: "If any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court."

For an account of the lenient way in which the acts of 1861 and 1862 were enforced by the Federal authorities, see Randall, *Constitutional Problems under Lincoln*, Chapter IV.

³⁵ As is well known Jefferson Davis was indicted for treason under the Treason Act of 1790 which prescribed the penalty of death upon conviction. However, before final trial, Mr. Davis was freed under the unconditional pardon, of December 25, 1868, by the President of all who had participated in the war.

³⁶ 8 Wall. 1.

³⁷ 20 Wall. 459.

Confederate States . . . had no existence, except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing Federal Government."

§ 680. Offences, Other than Treason, Against the Existence and Operations of the Federal Government.

The Federal Government, though restrained by the Constitution, with reference to the definition of treason, has the general power to define and punish as it sees fit all acts against its existence or undisturbed operation. Thus it has by statute defined and provided punishment for misprision of treason, inciting or engaging in rebellion or insurrections, criminal correspondence with foreign governments, seditious conspiracy, recruiting soldiers or sailors to serve against the United States, enlistment to serve against the United States, and, generally, acts which interfere with the effective operations of the government.³⁸

Whether, and to what extent, Congress has the power to punish seditious libels will be considered in the section dealing with Freedom of Speech and Press.³⁹

By the Espionage Act of June 15, 1917,⁴⁰ a long list of acts calculated to interfere with the successful carrying on of war by the United States, are declared criminal and punishable as such. Some of the provisions of this important act will receive consideration in connection with the discussion of such subjects as freedom of speech and press, the war powers of the Federal Government. The acts of Congress growing out of the Civil War have been already referred to.

§ 681. Corruption of Blood or Forfeiture.

The Constitution provides that no attainder of treason "shall work corruption of blood or forfeiture except during the life of the person attainted."

In order to avoid a possible claim against the constitutionality of the act of 1862, earlier referred to, Congress later passed a Joint Resolution which declared that the punishments or proceedings under the act should not be so construed as to work a forfeiture of the real estate of the offender beyond his natural life.⁴¹

³⁸ See §§ 1-8 and 27-84, of act of March 4, 1909, codifying, revising, and amending the penal laws of the United States, 35 Stat. at L. 1088.

³⁹ As to the constitutional power of Congress to afford special protection to the President, and to punish acts of violence committed against him, see House Rpt. 1422, 57th Cong., 1st Sess.

⁴⁰ 40 Stat. at L. 217.

⁴¹ 12 Stat. at L. 627. For construction of this Resolution see *Bigelow v. Forrest* (9 Wall. 339); *Day v. Miron* (18 Wall. 156); *Wallach v. Van Renswick* (92 U. S. 202). Cf. Watson, *On the Constitution*, p. 1157.

§ 682. Treason Against a State of the Union.

The punishment of the crime of treason against the United States is placed exclusively within the control of the Federal authorities. Treason against an individual State of the Union, however, is punishable by the authorities of the State, which authorities have, subject to the general limitations placed upon them by the Federal Constitution with reference to due process of law, *ex post facto* legislation, etc., the power to determine what acts shall be held to constitute treason against the State.⁴²

§ 683. Bills of Attainder.

Clause 3 of Section 9 of Article I provides that "No bill of attainder . . . shall be passed." And Clause 3 of Section 10 of the same article imposes a like prohibition upon the States.

These clauses have given rise to an inconsiderable number of judicial determinations. The principal case in definition of a bill of attainder is that of *Cummings v. Missouri*,⁴³ in which the court held unconstitutional the test oath of loyalty imposed by the Constitution of Missouri as a condition precedent to holding any State office of trust or profit, or practicing the profession of the law or ministry. The court declared: "The disabilities created by the Constitution of Missouri must be regarded as penalties—they constitute punishment." The oath, the opinion asserts, "was enacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen."

"A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body in addition to its legitimate functions, exercises the powers and office of judge, it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."⁴⁵

⁴² Upon this subject, see Watson, *On the Constitution*, pp. 1224 and 1778.

⁴³ 4 Wall. 277.

⁴⁵ The opinion continued: "If the clauses of the second article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach

The opinion then went on to declare that the questioned clauses of the Missouri Constitution were also invalid as *ex post facto* legislation, being aimed at past rather than future acts.

In *Ex parte Garland*,⁴⁶ decided at the same time as the *Cummings* case, the court held void, as a bill of attainder, the act of Congress of January 24, 1865, prescribing an oath that the deponent had never voluntarily borne arms against the United States, given aid to its enemies, etc., as a qualification for admission as an attorney, before the Federal courts.⁴⁷

A statute making the non-payment of taxes evidence of disloyalty during the Civil War and providing for the forfeiture of lands without a judicial hearing has been held to be a bill of attainder,⁴⁸ as was a law excluding from the United States Chinese who are citizens of the United States.⁴⁹

In *Pierce v. Carskadon*⁵⁰ it was held that a State act which deprived defendants of an existing procedural right with reference to the trial of past offences came within the constitutional prohibition as to bills of attainder, and was governed by the *Garland* and *Cummings* cases. The act in question was one which, as a condition of a rehearing in a case of trespass and carrying away of goods, required that the defendants should swear that they had

as a priest of the Catholic Church, or to teach in any institution of learning, there can be no question that the clauses would constitute a bill of attainder within the meaning of the federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if those clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the federal Constitution. In all these cases there would be the legislative enactment creating the deprivation, without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals. The results which follow, from clauses of the character mentioned, do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach and teach unless the presumption be first removed by their expurgatory oath. . . . In other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."

⁴⁶ 4 Wall. 333.

⁴⁷ Justices Miller, Swayne and Davis dissented in both the *Garland* and *Cummings* cases.

⁴⁸ *Martin v. Snowden* (18 Gratt. 100).

⁴⁹ *In re Yong Sing Hee* (13 Saw. 486).

⁵⁰ 16 Wall. 234.

never voluntarily borne arms against the United States, the reorganized Government of Virginia, or the State of West Virginia; that they had never given aid or comfort to persons engaged in armed hostility against these governments; that they had never sought, accepted or attempted to exercise any office or appointment whatever, civil or military under these governments; and that they had never yielded any voluntary support to any government or pretended government hostile or inimical to those governments.

§ 684. *Ex Post Facto* Legislation.

Ex post facto legislation upon the part of the States as well as by Congress is specifically forbidden by the Constitution.⁵¹ It thus results that, for the determination of what constitutes *ex post facto* legislation, within the meaning of the Constitution, the decisions of the Supreme Court with reference to State laws alleged to be of this character are of equal weight to its decisions with regard to acts of Congress against which the same defect is charged.

In the early case of *Calder v. Bull* ⁵² the prohibition was declared to relate only to criminal and not to civil proceedings, and, as thus limited, *ex post facto* laws were declared to be "every law that makes an action done before the passing of a law, and which was innocent when done, criminal; and punishes such action. Every law that aggravates a crime, or makes it greater than it was, when committed. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Every law that alters the legal rules of evidence, and requires less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

By later decisions this definition of *ex post facto* legislation has been broadened so as to include all laws which in any way operate to the detriment of one accused of a crime committed prior to the enactment of such laws.⁵³

⁵¹ Art. I, Sec. 9, clause 3; and Art. I, Sec. 10, clause 1.

⁵² 3 Dall. 386.

⁵³ In *Thompson v. Utah* (170 U. S. 343), the more important adjudications with reference to this subject were summarized as follows: "It is sufficient now to say that a statute belongs to that class [of *ex post facto* laws], which by its necessary operation and in its relation to the offence, or its consequences, alters the situation of the accused to his disadvantage. (*United States v. Hall*, 2 Wash. C. C. 366; *Kring v. Missouri*, 107 U. S. 221; *Medley*, Petitioner, 134 U. S. 160.) Of course a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed. And, therefore, it is well settled that the accused is not of right entitled to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him. Cooley in his *Treatise on Constitutional Limitations*, after referring to some of the adjudged cases relating to

In *Thompson v. Missouri* ⁵⁴ the court held that a State statute authorizing the comparison of disputed handwriting with any writing proved to be genuine is not an *ex post facto* law in its application to crimes previously committed, as altering the legal rules of evidence in existence at the time of the commission of the offence.

In *Johannessen v. United States* ⁵⁵ it was held that the retroactive operation of a Federal statute with regard to impeachment of naturalization certificates fraudulently or illegally obtained did not render the measure invalid as being *ex post facto* in character. The court said: "The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges. . . . The act makes nothing fraudulent or unlawful that was honest and lawful when it was done."

In *Bugajewitz v. Adams* ⁵⁶ it was held that it was not a violation of the *ex post facto* prohibition for Congress to provide for the deportation of

ex post facto laws, says: 'But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the persons accused of crime.' Chap. 9, § 272. And this view was substantially approved by this court in *Kring v. Missouri*, above cited. So, in *Hopt v. Utah* (110 U. S. 574), it was said that no one had a vested right in mere modes of procedure, and that it was for the State, upon grounds of public policy, to regulate procedure at its pleasure. This court, in *Duncan v. Missouri* (152 U. S. 377), said that statutes regulating procedure if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in *Hopt v. Utah* (above cited), that a statute which takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the offence charged against him."

Mr. Brainerd T. De Witt has an interesting article in the *Political Science Quarterly*, XV, p. 76, entitled "Are Our Legal Tender Laws *Ex Post Facto*?" in which he seeks to show, and with considerable success, that the framers of the Constitution probably intended that the prohibition upon the Federal Government to pass *ex post facto* laws should include a denial of the right of legislation to impair the obligation of valid contracts previously entered into.

⁵⁴ 171 U. S. 380.

⁵⁵ 225 U. S. 227.

⁵⁶ 228 U. S. 585.

aliens found practicing prostitution after their entry into the United States, even though this provision did not exist at the time of their entry. The court said that the determination of facts upon which to base deportation is not a conviction of crime, nor is the deportation a punishment. That prostitution was a crime by the local or State law was but a coincidence of the local law with the policy of Congress.⁵⁷

In the Chinese Exclusion cases—*Chae Chan Ping v. United States*⁵⁸—it was held that an act of Congress which provided that any Chinese laborer who had been a resident of the United States, who had departed therefrom and had not returned before the passage of the act could not lawfully return to the United States was not unconstitutional in character. The question as to the possible *ex post facto* character of this provision was not specifically discussed by the court in its opinion, but the fact that the law was upheld carried by necessary implication the determination that it was not open to this objection. And it is to be noted that, in its opinion, the court declared that whatever right the Chinese laborers might have obtained prior to the act to return to the United States was held “at the will of the Government, revocable at any time, at its pleasure.” “The power of exclusion of foreigners,” said the court, “being an incident of sovereignty belonging to the Government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time, when, in the judgment of the Government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”

In *McDonald v. Massachusetts*,⁵⁹ it was contended that a statute which defined as an habitual criminal one who had been twice convicted of a crime, and, for subsequent offences, provided a more severe penalty than would otherwise be imposable, was *ex post facto* in its operation when the earlier offences were committed prior to the passage of the act. The court, however, held that the additional penalties applied to the subsequent acts committed after the passage of the act. “The punishment is for the new crime only, but is the heavier if he is an habitual criminal.”

In *Hopt v. Utah*⁶⁰ it was held that statutes which enlarge the class of persons who may testify in criminal proceedings do not operate in an *ex post facto* manner when availed of in prosecutions for crimes committed prior to the passage of such acts. The court said: “Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor

⁵⁷ For the doctrine that deportation is not to be construed as a punishment, see also *Mahler v. Eby* (264 U. S. 32).

⁵⁸ 130 U. S. 581.

⁵⁹ 180 U. S. 311.

⁶⁰ 110 U. S. 589.

than was prescribed at the time of its commission; nor do they alter the degrees, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed."

It is well established that the constitutional provision regarding *ex post facto* legislation does not prevent retroactive changes as to the modes in which penalties are carried out, or even changes in the penalties themselves, so long as the accused or convicted one is not, in any substantive way, prejudiced thereby. This rule, it is evident, leaves it for final determination in each individual case by the court of last resort whether or not this is the case. The following cases give illustrations of the holding of the Supreme Court with regard to this question of fact.

In *Ex parte Medley* ⁶¹ it was held that, as applied to an offence committed prior to its enactment, a State statute was void which changed the manner in which the sentence of death for murder should be carried into execution. By the old law the execution was to be within twenty-five days from the date of sentence. By the new law it was to be within twenty-eight days. By the old law confinement prior to execution was to be in the county jail. By the new law this was to be in the penitentiary. By the old law the sheriff was the hangman. By the new law, the warden. Under the old law, no one had a right to access to the prisoner except his counsel, though the sheriff might, in his discretion, permit others to see him. By the new law he could be visited by counsel, physicians, spiritual advisers, and members of his family, but no one else could see him. Under the old law, his confinement might, at the discretion of the warden or sheriff, be absolutely solitary. Under the new law, access to the prisoner was a matter of right to all who ought to be permitted to see him. These various changes, or some of them at any rate, the court held to constitute a more severe punishment than had been provided for by the law which was in existence at the time the murder was committed, and, therefore, the new law was held, as to the petitioner, to be *ex post facto* in character. Having been indicted and tried under that law, the prisoner's release was ordered.⁶²

In *Holden v. Minnesota* ⁶³ it was held that a State law was not *ex post facto* in character because it changed somewhat the conditions under which execution by hanging for murder should be carried out. Said the court: "Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction . . . as to the number and

⁶¹ 134 U. S. 160.

⁶² *Quære*. Could he have been tried and punished under the old law?

⁶³ 137 U. S. 483.

character of those who may witness the execution, and the exclusion altogether of reporters or representatives of the press. . . . The only part of the Act of 1889 that may be deemed *ex post facto*, if applied to offenses committed before its passage, and after the adoption of the Penal Code, is section 4 requiring that, after the issue of the warrant of execution by the governor, 'the prisoner shall be kept in solitary confinement' in the said jail and certain persons only be allowed to visit him."

In *Rooney v. North Dakota* ⁶⁴ it was held that the substitution, in cases of conviction of murder in the first degree, of close confinement in the penitentiary for not less than six nor more than nine months after judgment and before execution of the death penalty, in place of confinement in the county jail for not less than three nor more than six months, and the change of the place of execution from the county jail to the penitentiary, did not cause a State law to be *ex post facto* in character.

In *Malloy v. South Carolina* ⁶⁵ it was held that the prisoner was not substantially disadvantaged by changing the hanging within the enclosure of the county jail to electrocution within the penitentiary and in the presence of an increased number of witnesses. The court referred to the number of States that had substituted electrocution for hanging as a mode of inflicting the death penalty, as showing a well-grounded belief that the former is more humane than the latter.

In *Hawker v. New York* ⁶⁶ it was held that a State law was not *ex post facto* in character which declared that no one should engage in the practice of medicine in the State who had been convicted of a crime. This provision, the court held, was a proper exercise of the police power of the State in the effort to protect its citizens. Such disqualification to practice medicine, it declared, was not in the nature of a penalty additional to that provided by the criminal law in force at the time a crime was committed. "The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation, of law. The former is merely the prescribed evidence of the latter." ⁶⁷

The *ex post facto* provision of the Constitution relates to acts of legislation and not to their construction by the courts. This has been the doctrine of the Supreme Court from the first. The authorities upon this point were reviewed in *Ross v. Oregon* ⁶⁸ in which case the court said: "But whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this court, with like uniformity, has regarded it as reaching every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of

⁶⁴ 196 U. S. 319.

⁶⁵ 237 U. S. 180.

⁶⁶ 170 U. S. 189.

⁶⁷ Justices Harlan, Peckham and McKenna dissented.

⁶⁸ 277 U. S. 150.

some other instrumentality of the State exercising delegated legislative authority. . . . Of course, the ruling here in question was by an instrumentality of the State; but as its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act, and not an exercise of legislative authority."⁶⁹

§ 685. Jury Trial.

By Article III, Section 2, Clause 3, it is provided that "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

By the Sixth Amendment, this requirement of a jury is repeated and the additional conditions imposed that the trial of persons accused of crime shall be speedy and public, the jury an impartial one, selected from the State and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and that the accused shall be informed of the nature and cause of the accusation, be confronted with the witnesses against him, have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defence.

The relation between this Amendment, and the third clause of Section 2 of Article III is, as stated in *Callan v. Wilson*,⁷⁰ that in the latter are enumerated, *ex abundanti cautela*, the rights to which, according to settled rules of common law, the accused is entitled.⁷¹

Offences committed outside the jurisdiction of a State are not local, but may be tried at such places as may be designated by Congress.

In the first crimes act of April 30, 1790, it was provided that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought." In other words, the provisions of the Sixth Amendment were held by Congress to apply only to crimes committed within a State and within its jurisdiction, leaving applicable to crimes committed outside a State only the provisions of Section 2 of Article III of the Constitution.⁷²

§ 686. Jury Trial in the District of Columbia and the Territories.

In *Callan v. Wilson*⁷³ it was held that the right of jury trial necessarily

⁶⁹ Citing *New Orleans Waterworks Co. v. La. Sugar Ref. Co.* (125 U. S. 18); *St. Paul Gaslight Co. v. St. Paul* (181 U. S. 142); *Davis and F. Mfg. Co. v. Los Angeles* (189 U. S. 207); and *Grand Trunk R. Co. v. Railroad Commission* (221 U. S. 400).

⁷⁰ 127 U. S. 540.

⁷¹ Cf. Story, *Commentaries*, § 1791.

⁷² *United States v. Dawson* (15 How. 467); *Jones v. United States* (137 U. S. 202).

⁷³ 127 U. S. 540. See also *Capital Traction Co. v. Hof* (174 U. S. 5).

applied within the District of Columbia and the Territories.⁷⁴ As to this the court said that this right "was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia as those residing in the several States. There is nothing in the history of the Constitution or of the original amendments, to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—especially of the privilege of trial by jury in criminal cases."⁷⁵

§ 687. Unanimity.

In *Springville v. Thomas*⁷⁶ it was claimed that the territorial legislature of Utah was empowered by the organic act [of Congress] September 9, 1850, to provide that unanimity of action on the part of the jurors in civil cases was not necessary to a valid verdict. The Supreme Court, however, said: "In our opinion the Seventh Amendment⁷⁷ secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so." The reasoning thus applied to the Seventh Amendment would of course equally apply to the Sixth Amendment. It is clear, however, that this *dictum* has been overruled by the *Insular* cases so far at least as regards the power of Congress over unincorporated territories.

§ 688. Twelve Jurors Required.

This declaration in *Springville v. Thomas* is quoted with approval in *Thompson v. Utah*,⁷⁸ the court adding: "It is equally beyond question that the provisions of the National Constitution relating to criminal prosecutions apply to the Territories of the United States." Assuming this to be true the court, in this latter case, went on to inquire whether the jury referred to in the Constitution is necessarily a jury of twelve persons, neither

⁷⁴ By the later *Insular* cases four of the justices held that this is true only as to "incorporated" territories, while Justice Brown held that it applies only when Congress has expressly or impliedly extended the Constitution to the territory in question. See *supra*.

⁷⁵ In *Capital Traction Co. v. Hof* (174 U. S. 1) the court said: "It is beyond question at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia" (quoting *Webster v. Reid*, 11 How. 437; *Callan v. Wilson*, 127 U. S. 540; *Thompson v. Utah*, 170 U. S. 343).

⁷⁶ 166 U. S. 707.

⁷⁷ "In suits at common law, where its value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

⁷⁸ 170 U. S. 343.

more nor less. This inquiry was resolved in the affirmative, and the court said: "When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."

§ 689. Courts and Actions in which Jury Not Required.

The right of trial by jury provided for in the Constitution applies only in the Federal courts, and in them it applies only to those cases in which, by common practice at the time the Constitution was adopted, it was employed in the colonies and in England. Thus it does not apply to equity causes, to cases in admiralty and to military courts, nor where the special prerogative rights of courts are involved, as, for example, in proceedings for disbarment or for contempt.⁷⁹

A serious constitutional question might, however, be raised by a legislative attempt to extend equity jurisdiction over a matter not essentially equitable in nature, and thus render it triable without a jury. As to such action upon the part of the States, the Federal question involved would possibly be one of due process of law.⁸⁰

In habeas corpus proceedings a jury is neither required nor proper.

It has been held that due process of law does not require a jury in the execution of administrative and executive functions, as, for example, the enforcement of the Chinese exclusion acts.⁸¹

⁷⁹ In *Re Debs* (158 U. S. 564), after asserting that it is often within the competence of a court of equity to enjoin the commission of an act; even though that act be also forbidden by the criminal law, the court declared: "Nor is there in this any invasion of the constitutional right of trial by jury . . . the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

In *Eilenbecker v. Dist. Court of Plymouth Co.* (134 U. S. 31), the court said: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes, one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

In *Ex parte Robinson* (19 Wall. 513), the court said: "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Cf. *Ex parte Terry* (128 U. S. 289).

⁸⁰ *Mugler v. Kansas* (123 U. S. 623).

⁸¹ See Chapter XC. In *Fong Yue Ting v. United States* (149 U. S. 698), the court said: "The proceeding before a United States judge, as provided for in section 6 of the Act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply

§ 690. Jury in Contempt Proceedings.

The constitutional power of Congress to require that Federal courts shall employ juries in contempt proceedings is discussed in a later chapter.⁸²

§ 691. Petty Offences.

It has been generally recognized by courts, Federal as well as State, that the guarantee of the right to a trial by jury does not apply to the petty offences which, at the time the Constitution was adopted, it was generally recognized might be more summarily dealt with. The enjoyment of the right is not, however, limited to felonies.⁸³

In *Callan v. Wilson*,⁸⁴ which was an appeal from a judgment refusing, upon writ of habeas corpus, to discharge the appellant from the custody of the marshal of the District of Columbia, the appellant having been sentenced to jail for thirty days upon conviction without jury trial in the police court of the District upon a charge of conspiracy, the Supreme Court, after

the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for a crime. It is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

⁸² Chapter LXXXVIII. See also Chapter XLIX in connection with the discussion of the Clayton Act.

⁸³ In *Callan v. Wilson* (127 U. S. 540), the court said: "The third article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment'. The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article, or a 'criminal prosecution' within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury."

For an excellent account of petty offences as known in Great Britain and in the American colonies prior to the adoption of the Constitution, see the article by Felix Frankfurter and T. G. Corcoran entitled "Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury," in XXXIX *Harvard Law Review*, 917.

⁸⁴ 127 U. S. 540.

reviewing cases in the States, and lower Federal courts, declared: "Except in that class or grade of offenses called petty offenses, which, according to common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee by an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put to trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury in an appellate court, after he has been once fully tried, otherwise than by a jury, in a court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

§ 692. Infamous Crimes.

The provision of the Fifth Amendment that no one shall be held to trial for a criminal offence unless on a presentment or indictment of a grand jury, is expressly limited to capital or other infamous crimes.⁸⁵ It would seem that there is no hard and fast definition, in American law at least, of an "infamous crime," each case having thus to be decided on its merits. Possibly the best general discussion of the meaning of the term is, however, that of the court in *Ex parte Wilson*,⁸⁶ where it is said: "Nor can we accede to the proposition which has been sometimes maintained, that no crime is infamous, within the meaning of the Fifth Amendment, that has not been so declared by Congress.⁸⁷ The purpose of the Amendment was to limit the powers of the legislature, as well as of the prosecuting officers of the United States. We are not indeed disposed to deny that a crime, to the conviction and punishment of which Congress has superadded a disqualification to hold office, is thereby made infamous.⁸⁸ But the Constitution protecting everyone from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard. The remaining question to be considered is whether imprisonment at hard labor for a term of years is an infamous punishment. Infamous punishments cannot be limited to those punishments which are cruel or unusual; because, by the Seventh Amendment of the Constitution, 'cruel and unusual punishments' are wholly forbidden, and cannot therefore be lawfully inflicted even in cases of convictions upon indictments duly

⁸⁵ "Cases arising in the land or naval forces, or in the militia, when in actual service in time of war and public danger" are excepted from the grand jury requirement.

⁸⁶ 114 U. S. 417.

⁸⁷ Citing *United States v. Wynn* (3 McCrary, 266); *United States v. Petit* (11 Fed. Rep. 58); *United States v. Cross* (1 MacArthur, 149).

⁸⁸ *United States v. Waddell* (112 U. S. 76).

presented by a grand jury. . . . What punishments may be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' (Act of September 24, 1789, chap. 20, § 9; 1 Stat. at L. 77.) But at the present day either stocks or whipping might be thought an infamous punishment. For more than a century, imprisonment at hard labor in the state prison or penitentiary or other institution has been considered an infamous punishment in England and America. . . . Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution; and that the District Court, in holding the petitioner to answer for such a crime, and sentencing him to such imprisonment, without indictment by a grand jury, exceeded its jurisdiction, and he is therefore entitled to be discharged."

The practical construction which the cases have put upon the constitutional provision with reference to indictments has been that there must be an indictment in every case in which the imprisonment may be for more than one year, inasmuch as by Section 5541 of the Revised Statutes it is provided that whenever a person is sentenced to more than one year's imprisonment he may be required to serve the sentence in a penitentiary. By the provision of Section 335 of the act of March 4, 1909, revising, amending and codifying the penal laws of the United States, it is declared that "all offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

It is thus apparent that, in the Federal courts, the distinction between crimes which are infamous and those which are not, is substantially that between felonies and misdemeanors. It is, however, suggested by the court in *Ex parte Wilson* that there may be crimes which, in public opinion, are so disgraceful that they may be held infamous without regard to the character of punishment attached to their commission. It would also appear that where hard labor is added to imprisonment the crime may be deemed to be infamous within the meaning of the Fifth Amendment.

It is also to be observed that the decisive fact is not as to what punishment may, in fact, be inflicted, but as to what penalty may, under the law, be inflicted.⁸⁹

⁸⁹ Cf. *United States v. Moreland* (258 U. S. 433), in which it was held that an offence

§ 693. Waiver of Constitutional Guaranties.

The law governing the waiver by the accused of his constitutional right to a trial by jury in criminal actions, or to a trial by less than twelve jurors, and, indeed, the waiver of any constitutional guaranty, is not in a clearly determined condition. In cases arising under State constitutions, inharmonious doctrines have been declared. In some jurisdictions the position has been taken that the guaranties are intended merely for the benefit of the accused and may, therefore, be waived. In other States the courts have held that the guaranty of jury trial in criminal cases is one in which the State also has an interest, and which for that reason may not be waived. In some courts, a third view is taken that the jury is essential to give the court jurisdiction, and that while, in case of a plea of guilty, the court may at once pronounce judgment, because there are no facts to be determined, where the plea is not guilty, an issue is raised which only a jury is competent to decide.⁹⁰

In the United States Supreme Court it was held in *Schick v. United States*⁹¹ that jury trial might be waived in the trial of minor offences. The constitutional provision, it was said, must be interpreted in the light of the common-law practice as it existed at the time of the adoption of the Constitution, and this practice, as shown by Blackstone's *Commentaries*, which the court quoted, was that while the word "crimes" technically included misdemeanors as well as felonies, in common usage, a crime denoted "such offenses as one of a deeper and more atrocious dye," and that it is in this sense that the word is used in the constitutional requirement that the trial of all crimes shall be by jury. Public policy, it was declared, does not demand that the lesser offences, termed misdemeanors, shall be tried by jury, and "where there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."⁹²

In *Dickinson v. United States*,⁹³ however, the Circuit Court of Appeals for the First Circuit held that a cashier indicted for "the unlawful conversion of certain moneys, funds of credit" described as a misdemeanor by Section 5209 of the Revised Statutes, could not consent to a trial by a jury of less than twelve. In this case the court distinguished between the pro-

the punishment for which may be by imprisonment at hard labor in a workhouse of the District of Columbia, is an infamous crime.

⁹⁰ See note in *Columbia Law Review*, VIII (1908), 577, and authorities there quoted.

⁹¹ 195 U. S. 65.

⁹² Justice Harlan dissented in an elaborate opinion, citing, *inter alia*, *Hopt v. Utah* (110 U. S. 574); *Thompson v. Utah* (170 U. S. 343); *Cancemi v. People* (18 N. Y. 128); *Hill v. People* (16 Mich. 351); *State v. Carman* (63 Iowa, 130); *State v. Mansfield* (41 Mo. 470); *Wilson v. State* (16 Ark. 601); *Work v. Ohio* (2 Ohio St. 296); *U. S. v. Taylor* (3 McCrary, 500).

⁹³ 159 Fed. Rep. 801.

visions of the first ten amendments which were declared to be in the nature of a Bill of Rights for the benefit of the individual, and the requirements of the Constitution as originally adopted, which establish a form of government which may not be altered by the individual.

The right of the accused to waive jury trial in cases of felony has never come before the Supreme Court; but in *Lewis v. United States*⁹⁴ that court held that, in felonies, the presence of the accused could not be waived either by himself or by counsel. The record must show, affirmatively, the presence of the prisoner in court during the trial.⁹⁵ It would seem that, in this case at least, the Supreme Court held that a right guaranteed by the Amendments, as distinguished from those in the body of the Constitution, might not be waived.⁹⁶

§ 694. Right to Jury Trial Not Fundamental.

In the majority opinion in *Hawaii v. Mankichi*⁹⁷ the rather surprising statement was made that grand and petit juries in criminal proceedings "are not fundamental in their nature, but concern merely a method of procedure" and that, therefore, these two institutions were not to be construed as necessarily introduced into the islands by the resolution of Congress of July 7, 1898, recognizing the islands "as a part of the territory of the United States and subject to the sovereign dominion thereof," and continuing in force the municipal legislation of such islands not inconsistent with such resolution, "nor contrary to the Constitution of the United States."⁹⁸

§ 695. Jury Trial in Civil Suits.

By the Seventh Amendment it is provided that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

This provision, it has been determined by the Insular cases, does not apply *ex proprio vigore* to the unincorporated Territories.

Trial by jury, as used in this provision, refers to a jury of twelve men, in the presence of and under the superintendence of a judge empowered to instruct them in the law and to advise them on the facts, and to set aside their verdict if, in his opinion, against the law and the evidence. The "rules of common law," refer, of course, to the common law of England, which per-

⁹⁴ 146 U. S. 370.

⁹⁵ Justices Brewer and Brown dissenting.

⁹⁶ As to the waiver by the accused of his right to plead *autrefois acquit*, by taking an appeal to a superior court, see section entitled "Double Jeopardy."

⁹⁷ 190 U. S. 197.

⁹⁸ To this doctrine Justice Harlan vigorously dissented, the reasoning of whose opinion it is not easy to answer.

mit a new trial, granted by the trial court or by an appellate court for errors in law committed on the first trial.

In *Capital Traction Co. v. Hof*⁹⁹ it was held that the right to a jury is preserved, when an appeal, on giving bond, is allowed from a judgment of a justice of the peace to a court of record, where trial is had by jury. The constitutional provision, it was pointed out, does not prescribe at what stage of an action a trial by jury must, if demanded, be had, or what conditions may be imposed upon the demand of such a trial, consistently with preserving the right to it. After a careful review of the practice in the States at the time of the adoption of the Constitution, and since, the court held that the provision of an act of Congress requiring every appellant from the judgment of a justice of the peace in the District of Columbia to give security to pay and satisfy the judgment of the appellate court was consistent with that preservation of the right of trial by jury required by the Seventh Amendment.¹⁰⁰

§ 696. Waiver of Jury in Civil Cases.

The right to a jury trial in civil cases, whatever the value in controversy, may be waived. No objection to a waiver was made in the early case of *Parsons v. Armor*;¹⁰¹ nor later in *Bamberger v. Terry*;¹⁰² nor in *Supervisors of Wayne Co. v. Kennicott*.¹⁰³ Indeed the right to waive has not been seriously questioned.

§ 697. Appeals and the Seventh Amendment.

The guaranties of the Seventh Amendment, like other provisions of the Constitution, are interpreted in the light of common-law practices or understandings at the time the Amendment or the Constitution was adopted. In fact, by the Amendment itself it is declared that the verdicts of juries as to facts may be reexamined according to the rules of the common law. In accordance with these practices or understandings the courts, from the beginning, have found no difficulty in holding that the verdicts of juries may be set aside by the presiding judge and new trials ordered upon the ground that such verdicts are contrary to the evidence, or not supported by evi-

⁹⁹ 174 U. S. 1. The court in this case went on to point out that, even were a jury used in the court of the justice of the peace, as was permitted by the statute creating that court, the constitutional requirements relating to jury trials would not be satisfied since that statute did not require the justice to superintend the course of the trial or to instruct the jury in matters of law, or authorize him, upon the return of their verdict to arrest judgment upon it or to set it aside for any course whatever, but made it his duty to enter judgment upon it forthwith and as a matter of course. A body of men thus free from judicial control, the court said, was not a common-law jury, nor did a trial by them satisfy the constitutional requirements with regard to jury trials. This would be so even were the jury to consist of twelve men.

¹⁰⁰ 174 U. S. 1.

¹⁰¹ 3 Pet. 413.

¹⁰² 103 U. S. 40.

¹⁰³ 103 U. S. 554.

dence sufficient in law to support them, and also that, upon appeal from the refusal of the judge to grant a new trial, appellate courts may, upon such grounds, set aside a verdict and direct a new trial.¹⁰⁴

In the early case of *Parsons v. Bedford*¹⁰⁵ the court, referring to the constitutional provision that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law," said: "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervned in the proceedings."

In *Walker v. New Mexico & S. P. R. Co.*¹⁰⁶ the court, speaking of the Seventh Amendment, said: "This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. . . . A general verdict embodies both the law and the facts. The jury, taking the law as given by the courts, apply that law to the facts as they find them to be, and express their conclusions in the verdict. The power of the court to grant a new trial if, in its judgment, the jury have misinterpreted the instructions as to the rules of law, or misapplied them, is unquestioned, as also when it appears that there is no real evidence in support of any essential fact. These things obtained at the common-law; they do not trespass upon the prerogative of the jury to determine all questions of fact."

In *Capital Traction Co. v. Hof*¹⁰⁷ the court said: "It must . . . be taken as established, by virtue of the Seventh Amendment . . . that when a trial by jury has been had in an action at law, in a court, either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the final trial was had, or to which the record was returnable, or ordered by an appellate court for error in law; and therefore, that unless a new trial has been granted in one of these two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."

In *Slocum v. New York Life Ins. Co.*¹⁰⁸ the court held that the guarantee

¹⁰⁴ It does not need to be said that acquittals in criminal trials are final. See *post*, § 706, discussion of double jeopardy.

¹⁰⁵ 3 Pet. 433.

¹⁰⁶ 165 U. S. 593.

¹⁰⁷ 174 U. S. 1.

¹⁰⁸ 228 U. S. 364.

of the Seventh Amendment was impaired by the Federal Circuit Court of Appeals, which, reversing a judgment of the lower Federal court, directed that a judgment be entered in favor of the plaintiff, notwithstanding the verdict in the lower court in favor of the defendant. The Supreme Court held that the limit of the right of the Circuit Court of Appeals was to direct that a new trial be had, if error in the trial court were found.

The holding of the court in this case was rendered by a closely divided court—five justices concurring and four justices dissenting—and, at the time, was much criticized. It has, however, been since reaffirmed by the court in *Pedersen v. Delaware, L. & W. R. Co.*,¹⁰⁹ and *Myers v. Pittsburgh Coal Co.*¹¹⁰

In the *Slocum* case, the court, after reviewing earlier cases, said: "These decisions make it plain, first, that the action of the circuit court of appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the circuit court, and order a new trial, it could not itself determine the facts; third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance.

. . . When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. . . . While it is true . . . that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff, and that the circuit court erred in refusing so to instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common-law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practised. And this proceeding was regarded as of real value, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues."

The court continued: "We do not overlook the fact that at common law there were two well-recognized instances in which the verdict could be disregarded and the case disposed of without a new trial. One was where the defendant's plea confessed the plaintiff's cause of action and set up matter in avoidance which, even if true, was insufficient in law to constitute a bar or defense; and the other was where the plaintiff's pleading, even if its allegations were true, disclosed no right of recovery. If in either instance a verdict was taken, the court nevertheless could make such disposition of the case as was required by the state of the pleadings, and this because the issues settled by the verdict were wholly immaterial. In the first instance the

¹⁰⁹ 229 U. S. 146.

¹¹⁰ 233 U. S. 184.

court's action was invoked by a motion for judgment *non obstante veredicto*, and in the latter by a motion to arrest judgment on the verdict."

The court further found that there is nothing in the established rules governing the operation of a demurrer to evidence at common law which has a tendency to show that issues of fact tried by jury can be reëxamined otherwise than on a new trial. As to judgments rendered in cases in which the plaintiff is non-suited, the court pointed out that there is no adjudication, other than the imposition of costs, and, therefore, no bar raised to another action for the same cause. In such cases there is, ordinarily, no compulsion upon the plaintiff who may, if he sees fit, have the matter left to the jury. (Of two cases¹¹¹ which seemed to hold, one expressly and the other by implication, that the constitutional right to jury trial was not invaded by statutes authorizing the court to enter compulsory non-suits against the plaintiff for an insufficiency in his evidence, but which did not prevent him from suing again on the same cause of action, the court said: "They neither hold nor suggest that, consistently with that right, the court can refuse to take the verdict of the jury, or disregard it when taken, and enter a binding judgment on the evidence.")

Concluding its opinion in the *Slocum* case, the court said: "Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings, and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is as true of the second trial as of the first."¹¹²

§ 698. Right of Judges to Direct Verdicts.

It is evident that when a jury is directed by the presiding judge to return a specified verdict, no opportunity is given to the jury to express a real judgment upon the facts. It might seem, therefore, that, in such cases, the constitutional right to a jury trial is infringed. In fact, the exercise of this authority, though unknown to the common law at the time the Seventh Amendment was adopted, has been exercised by Federal judges since 1850 when it has appeared that, as a matter of law, the evidence adduced can support no other than the directed verdict.¹¹³

In *Improvement & R. R. Co. v. Munson*,¹¹⁴ the court, upon the authority

¹¹¹ *Central Transp. Co. v. Pullman's Palace Car Co.* (139 U. S. 24) and *Coughran v. Bigelow* (164 U. S. 301).

¹¹² For an excellent and exhaustive analysis of the *Slocum* case, and one in which the author expresses his agreement with the court's ruling, see the three articles by the late Professor Henry Schofield, entitled "New Trials and the Seventh Amendment" in VIII *Illinois Law Review*, 287, 381, 465.

¹¹³ Cf. IV *Encycl. of Pleading and Practice*, 673. The practice of directing a verdict took the place of the earlier practice of demurring to the evidence.

¹¹⁴ 14 Wall. 442.

of English cases, declared: "Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule: that in every case, before the evidence is left to the jury, there is the preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it and upon whom the *onus* of proof is imposed."

In *Coughman v. Bigelow* ¹¹⁵ we find the court saying: "It has long been the doctrine of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict." *Parks v. Ross* (11 How. 362); *Schuchardt v. Allen* (1 Wall. 359); *Pleasants v. Fant* (22 Wall. 120). And, in the case of *Oscanyon v. Winchester Repeating Arms Co.* (103 U. S. 264), it was said by Mr. Justice Field, in delivering the opinion of the court, that the difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is "rather a matter of form than of substance."

Equally explicit is the declaration of the court in *Patton v. Texas & P. R. Co.* ¹¹⁶ when it says: "That there are times when it is proper for a court to direct a verdict is clear. It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." ¹¹⁷

In *Pleasants v. Fant* ¹¹⁸ the question was examined at length and the reason and justification for the practice stated as follows: "It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, by setting aside a verdict

¹¹⁵ 164 U. S. 301.

¹¹⁶ 179 U. S. 658.

¹¹⁷ Citing a considerable number of cases.

¹¹⁸ 22 Wall. 116.

which is unsupported by evidence or contrary to law. In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial be had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is sufficient to warrant a verdict for the plaintiff, the court should say so to the jury. In such case the party can submit to a nonsuit and try his case again if he can strengthen it, except where the local law forbids a nonsuit at that stage of the trial, or if he has done his best he must abide the judgment of the court, subject to a right of review, whether he has made such a case as ought to be submitted to the jury; such a case as a jury might justifiably find for him a verdict."

The most recent case in the Supreme Court upon this subject is that of *Horning v. District of Columbia* ¹¹⁹ in which the trial judge had directed the jury to return a verdict of guilty, there being no conflict of evidence as to the guilt of the accused. The Supreme Court said: "This was not a case of the judge's expressing an opinion upon the evidence, as he would have had a right to do. *Graham v. United States*, 231 U. S. 474. The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. If the facts are agreed the judge may state that fact also, and when there is no dispute he may say so although there has been no formal agreement." ¹²⁰

¹¹⁹ 254 U. S. 135.

¹²⁰ The Chief Justice and Justices McReynolds, Brandeis and Day dissented. In this case the trial judge, in his charge to the jury, had said: "In conclusion I will say that a failure to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. Of course, gentlemen, I cannot tell you in so many words to find defendant guilty, but what I say amounts to that."

§ 699. Instructions to Juries.

In not a few of the States the judges are forbidden by statute or constitutional provision to express to juries their personal opinions as to the credibility of witnesses or of the weight of the testimony that has been presented. This practice has not prevailed in the Federal courts, although the judge is required to make plain to the juries that they are not bound by his opinions, they being the final and sole judges of questions of fact.

There have, however, been cases in which the Federal judges in the trial courts have expressed their opinions in such strong terms that the Supreme Court, upon writ of error, has held that the disclaimer that the juries were not to hold themselves bound by the opinions thus expressed was ineffective to leave them as free as they constitutionally should have been left to determine for themselves the questions of fact in dispute. Thus, in *Starr v. United States*,¹²¹ which was such a case, the Supreme Court said: "It is true that in the Federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he thinks proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of fact are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error.¹²² But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. . . . It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.¹²³ The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to express an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances."¹²⁴

In *Re Peterson*¹²⁵ it was held that the jury's constitutional right to determine issues of fact is not unduly interfered with by the appointment of an auditor to form and express an opinion upon facts and items in dispute, the report of such auditor being submitted at the trial only as *prima facie* evidence of the facts and findings embodied therein. Nor, it was held, was the jury trial unduly modified by the holding of preliminary tentative hearing before such auditor.

¹²¹ 153 U. S. 614.

¹²² Citing *Rucker v. Wheeler* (127 U. S. 85); and *Lovejoy v. United States* (128 U. S. 171).

¹²³ Citing *Hicks v. United States* (150 U. S. 442).

¹²⁴ See also *Alliance v. United States* (160 U. S. 203), and *Hickory v. United States* (160 U. S. 408).

¹²⁵ 253 U. S. 300.

§ 700. Legislative Power to Declare what Prima Facie or Conclusive Deductions Are to Be Drawn from Specified Facts.

The province of the jury so far as it is constitutionally guaranteed, is to determine, from the evidence presented, the facts in issue. The legal significance of these facts it is within the authority of the judge, guided by the common and statute law, to determine. When, however, the legislature attempts to declare what facts are to be inferred from other specified facts, a basis is laid for the contention upon the part of the one adversely affected by this legislative direction that he is deprived of due process of law, or that his right to a determination of the facts by a jury is denied.

An instance of this contention, which was held by the court to be a valid one, was seen in *State v. Strasburg*,¹²⁶ decided by the Supreme Court of the State of Washington. In that case the trial court had refused to admit evidence tending to prove that the defendant, at the time of committing the offence with which he was charged, was insane, and therefore incapable of understanding the nature and propriety of his acts, and had charged the jury that, under the laws of the State, it was no defence to a criminal charge that the person charged with its commission was unable, by reason of insanity or idiocy, to comprehend the nature or quality of the act or to understand that it was wrong. The Supreme Court reversed the decision and held that the provision of the Code of the State which had been relied upon by the trial judge was unconstitutional in that it denied to the jury the right to determine the fact of intent, which, the court declared, is an essential element of crime.¹²⁷

§ 701. Jury Trials under Conditions that Prevent Independent and Impartial Action.

When the conditions under which a jury trial is held is such as clearly to prevent the jury, either by reason of personal fear or the pressure of excited public feeling, from rendering an independent and impartial verdict, it would seem that the right to the jury trial is deprived of one of its essential qualities. In such cases, however, it has been usual upon the part of the one who alleges himself to have been disadvantaged to assert a denial of due process of law rather than to rely upon the claim that, in substance, he has been denied his constitutional right to have the facts at issue passed upon by a jury. This phase of the subject will, therefore, be treated later on in connection with the discussion of Due Process of Law.¹²⁸

§ 702. The Right to Jury Trial and Administrative Determinations.

Elsewhere in the present treatise consideration is given to the question of the extent to which it is constitutionally permissible for statutory provision

¹²⁶ 110 Pac. Rep. 1022.

¹²⁷ For a discussion of this case see 59 *University of Pennsylvania Law Review*, 252.

¹²⁸ See Chapter XCII.

to be made for the determination of private rights and the enforcement of law through administrative rather than judicial processes. This question has especial reference to the matter of fulfilling the requirements of due process of law as provided by the Fifth Amendment, so far as the Federal Government is concerned, and by the Fourteenth Amendment, so far as the States are concerned. It will there appear that administrative agencies, as distinguished from purely judicial tribunals, may constitutionally exercise functions that are judicial, or at least, *quasi-judicial* in character.

It is established that, when exercising these judicial or *quasi-judicial* functions, administrative agencies are not required to employ juries for the determination of facts. In *Ex parte Wall*,¹²⁹ the court said: "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge on a writ of habeas corpus using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissions in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone, and courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts."

The foregoing, it is seen, relates to judicial determinations of acts without the intervention of juries. It is recognized, however, that similar determinations may be made by administrative agencies. The leading case on this subject is probably that of *Murray's Lessee v. Hoboken Land and Improvement Co.*¹³⁰ In that case it was held that a distress warrant issued by the Solicitor of the Treasury for the collection of an account due the Government by a delinquent collector was not a denial of due process of law. In the course of its opinion the court said: "Though generally both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both." The court went on to say that it would not be proper for Congress to withdraw from judicial cognizance matters which, from their very nature, would be subject to suit at common law or in equity or admiralty, but added: "At the same time there are matters, involving public rights, which may be presented in such a form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

It would appear, then, that where the requirement of due process of law is not violated by vesting the determination of facts in administrative tri-

¹²⁹ 107 U. S. 265.

¹³⁰ 18 How. 272.

bunals, there is no constitutional necessity that those tribunals should employ juries. In other words, the constitutional right to jury trial is confined to proceedings in courts, and only then when they are adjudicating common-law causes.

§ 703. Jury Trial Not Required in State Courts by the Seventh Amendment.

That the first ten Amendments to the Constitution, and including therefore the Seventh Amendment, operate as limitations upon the Federal Government and not upon the States, of course, well established.¹³¹ However, in *Minneapolis & St. L. R. Co. v. Bombolis*,¹³² it was urged that, when a State court was enforcing rights under a Federal statute, it was obligated by the Seventh Amendment to employ a jury of twelve, from which a unanimous verdict would be required for the determination of the facts at issue.¹³³ The Supreme Court, denying this contention, said: "The limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore . . . its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States."

§ 704. Speedy Trial.

The Sixth Amendment secures to the accused a speedy as well as a public trial. This provision has received very little discussion in the Federal courts, and, so far as the author is aware, no case in which its violation has been asserted has reached the Supreme Court.

§ 705. Public Trial.

The Constitution expressly provides that criminal trials shall be publicly conducted, and, indeed, it would seem that publicity has been a common-law incident of trials for crime. Many of the State constitutions also expressly provide that proceedings shall be public. In numerous cases, however, it has been held by the State courts that this does not prevent the more or less complete exclusion of spectators where public morals have seemed to require it, and where no prejudice to the accused is thereby occasioned.¹³⁴ The question has not been passed upon by the Federal Supreme Court.

¹³¹ Leading cases as to this are *Barron v. Baltimore* (7 Pet. 243); *Fox v. Ohio* (5 How. 410); *Twitchell v. Pennsylvania* (7 Wall. 321); *Brown v. New Jersey* (175 U. S. 172); *Twining v. New Jersey* (211 U. S. 78). As to the Seventh Amendment in particular, see *Livingston v. Moore* (7 Pet. 469); *Supreme Justice v. Murray* (9 Wall. 274); *Edwards v. Elliott* (21 Wall. 532); *Walker v. Sauvinet* (92 U. S. 90); *Pearson v. Yewdall* (95 U. S. 294).

¹³² 241 U. S. 211.

¹³³ The State practice provided in certain cases for a less than unanimous verdict.

¹³⁴ But see *contra*, *State v. Hensley* (79 N. E. Rep. 462).

§ 706. Double Jeopardy.

It is provided by a clause of the Fifth Amendment that no person shall be subject for the same offence to be twice put in jeopardy of life or limb.

Cases may occur in which the same act may render the actor guilty of two distinct offences; as, for example, the passing of counterfeit coin of the United States, which may be both an offence against the United States, and, as a fraud on its citizens, an offence against the State. In such cases the accused cannot plead the trial and acquittal, or the conviction and punishment for one offence in bar to a conviction for the other.¹³⁵

A number of cases involving claims that double jeopardy has been suffered have arisen under the Volstead prohibition act. These have arisen not only when the accused has been held criminally liable for the same act in both Federal and State courts, but when the same act, or set of acts, has been held to constitute two or more distinct offenses. As to this latter holding, the Supreme Court, in *Albrecht v. United States*,¹³⁶ decided in 1927, the court said: "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has the power to prohibit. The precise question does not appear to have been discussed in either this or a lower Federal court in connection with the National Prohibition Act; but the general principle is well established."

From this class of acts which constitute two or more distinct offences, are to be distinguished those acts which are punishable by the tribunals of two or more countries, or by two or more tribunals of the same country. Here the offence is a simple one, but cognizable in two jurisdictions. In such case an acquittal or punishment in one may be pleaded in bar to a prosecution in another court based upon the same act. Thus, in *Grafton v. United States* ¹³⁶ it was held that one acquitted by a military court of competent

¹³⁵ *Fox v. Ohio* (5 How. 410); *U. S. v. Marigold* (9 How. 560); *Moore v. Illinois* (14 How. 13). In the last case the court said: "A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State,—a riot, assault, or a murder,—and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

^{136a} 273 U. S. 1.

¹³⁶ 206 U. S. 333.

jurisdiction could not be tried a second time in a Federal civil court for the same offence.¹³⁷

This doctrine as to double jeopardy holds even though the punishment which may be inflicted by the one court is different from or greater than that which may be imposed by the other; or even if the indictment in the one court charge a different crime from that stated in the other.

In *United States v. Clark*,¹³⁸ however, there is a dictum to the effect that an acquittal by a military court does not operate as a bar to a criminal prosecution in a civil court based upon the same act. In *Wilkes v. Dinsman*¹³⁹ there is a dictum to the opposite effect. It would appear, however, that it is the opinion of the military authorities, supported by an opinion of the Attorney General¹⁴⁰ that an act which is punished in the civil courts can also furnish a basis for proceedings in a military tribunal when there is ground for holding that the act is also an offence against the military law, that is, that two distinct offences have been committed.

In *Commonwealth v. Roby*¹⁴¹ the court said: "An acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder."¹⁴²

In *United States v. Lanza*,¹⁴³ it was held that a person could be punished for the same act in both the Federal and State courts under the National Prohibition Act and a State prohibition law. The court said: "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."¹⁴⁴

In *Graham v. West Virginia*¹⁴⁵ it was held that a former convict was not

¹³⁷ The court refused assent to the view that the accused had committed two distinct offences—one against military law and discipline, the other against the civil law.

¹³⁸ 31 Fed. Rep. 710.

¹³⁹ 7 How. 123.

¹⁴⁰ 6 Op. Atty. Gen. 413.

¹⁴¹ 12 Pick. (Mass.) 503.

¹⁴² Citing *Starkie, Crim. Pl.*, 2d ed. 322.

¹⁴³ 260 U. S. 377.

¹⁴⁴ See also *Herbert v. Louisiana* (272 U. S. 312).

¹⁴⁵ 224 U. S. 616.

placed twice in jeopardy by being brought, after conviction, before the court of another county in a separate proceeding by information charging him with prior convictions which had not been alleged in the indictment on which he had been previously tried and convicted, and, on the finding of the jury in the new proceedings that he was a former convict, being sentenced to additional punishment in accordance with a law providing for such punishment to habitual criminals.

§ 707. What Constitutes Jeopardy.

What constitutes "jeopardy" is, in accordance with the general principle of constitutional construction, to be determined by the usage of the word and the custom of the common law at the time the Constitution was adopted. By the common law not only was a second punishment for the same offence prohibited, but a second trial forbidden whether or not the accused had suffered punishment, or had been acquitted or convicted.¹⁴⁶

It is not necessary, in order that prior jeopardy may be pleaded in bar, that there should have been a former trial and verdict by a jury. This is not the rule uniformly stated, but as declared by the Supreme Court in *Kepner v. United States*,¹⁴⁷ "the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him: certainly so after acquittal."¹⁴⁸ "Undoubtedly," the court added, "in those jurisdictions where a trial of one accused of crime can only be by a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But protection being against a second trial for the same offense, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been put in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit."¹⁴⁹

Where, upon a former trial, the jury had reported disagreement, and it appeared reasonably certain that an agreement could not be obtained, and the jury had been discharged by the court, a plea of former jeopardy was held not good.¹⁵⁰

¹⁴⁶ *Ex parte Lange*, 18 Wall. 163.

¹⁴⁷ 195 U. S. 100.

¹⁴⁸ Citing *Coleman v. Tenn.* (97 U. S. 509).

¹⁴⁹ Citing *People v. Miner* (144 Ill. 308); *State v. Bowen* (45 Minn. 145); *State v. Layne* (96 Tenn. 668).

¹⁵⁰ In *United States v. Perez* (9 Wh. 579), the court said: "We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject;

In *Hotema v. United States*¹⁵¹ it was held that a plea of former jeopardy to an indictment for murder could not be based upon the fact that, upon the trial of two consolidated indictments for two other murders committed by the defendant on the same day as the one charged in the indictment in question, he was found not guilty because insane, which defence was again set up.

In *Collins v. Loisel*¹⁵² it was held that the constitutional provision against double jeopardy does not apply unless the accused has been previously placed on trial, and that a preliminary examination of one arrested on suspicion of crime and his discharge by the magistrate does not constitute such a trial and acquittal.¹⁵³ The court added: "Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing v. Cady*,¹⁵⁴ not to constitute jeopardy."

In *Lovato v. New Mexico*¹⁵⁵ it was held that the accused had not been twice placed in jeopardy because, after the overruling of demurrer to the indictment which had been entertained after a plea of not guilty had been entered and not withdrawn, the jury which had been impaneled and sworn was dismissed, and the accused forthwith arraigned and required to plead, and, both sides announcing themselves ready for trial, the same jury was sworn and the trial proceeded with.

In *Stroud v. United States*¹⁵⁶ it was held that a person found guilty of murder in the first degree but, under Section 330 of the Criminal Code with punishment mitigated to life imprisonment, was not placed in double jeopardy by an unqualified conviction of murder in the first degree, carry-

and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

In *Keerl v. Montana* (213 U. S. 135), the court, quoting the above, said: "This is the settled law of the Federal courts since that time." Citing *Logan v. United States* (144 U. S. 263); *Thompson v. United States* (155 U. S. 271); *Dreyer v. Illinois* (187 U. S. 71).

¹⁵¹ 186 U. S. 413.

¹⁵² 262 U. S. 426.

¹⁵³ Citing *Com. v. Rice* (216 Mass. 480) and *People v. Dillon* (197 N. Y. 254).

¹⁵⁴ 208 U. S. 386.

¹⁵⁵ 242 U. S. 199.

¹⁵⁶ 251 U. S. 15.

ing the death penalty, in a new trial had after the conviction had at the first trial had been reversed upon a writ of error sued out by the accused.

§ 708. Jeopardy and the Right of Appeal.

It is established that, in criminal cases, the State has no right of appeal where the accused may fairly be said to have been placed in jeopardy. This, the doctrine of the common law, has been repeatedly accepted by the United States Supreme Court.¹⁵⁷ A verdict or a judgment in a trial court in favor of the accused is, therefore, as to him, final and conclusive. But acquittal before a court without jurisdiction is absolutely void and, therefore, no bar to a subsequent indictment and trial before a court having jurisdiction. The fact that an indictment was fatally defective does not render the judgment void, but voidable only. This the government could not set up on a writ of error, and, of course, the defendant would not. The judgment cannot be collaterally attacked. Thus in *United States v. Ball* ¹⁵⁸ the court said: "As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."¹⁵⁹

Where, upon conviction, the defendant has taken an appeal, and a new trial has been ordered, he may be found guilty of an offence of a higher degree than that originally found against him. Thus a verdict of manslaughter having been rendered, and appeal taken, and a new trial awarded, a verdict of murder may be returned. This is the doctrine definitely declared in *Trono v. United States*,¹⁶⁰ the court, after a review of authorities, saying: "We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for its reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he has himself procured to be reversed."

¹⁵⁷ See *United States v. Sanges* (144 U. S. 310), and authorities there cited.

¹⁵⁸ 163 U. S. 662.

¹⁵⁹ In *Kepner v. United States* (195 U. S. 100), this language is quoted and approved, the court adding: "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not . . . against the peril of second punishment, but against being tried for the same offence."¹⁶⁰

¹⁶⁰ 199 U. S. 521.

As to the right of the defendant thus, by seeking a new trial, to waive the constitutional protection afforded him by the first judgment, the court admitted that by seeking a new trial the accused may and does waive his right to the plea of former jeopardy as to the crime of which he has been convicted.¹⁶¹ The only question is as to the extent of that waiver, and, the court said, it "seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense." The doctrine of *Hopt v. Utah*¹⁶² that a man may not waive his fundamental constitutional rights, does not, therefore, govern.¹⁶³

§ 709. The Constitutionality of Appeal by the Government in Criminal Cases.

In the dissenting opinion filed by Justices Holmes, White and McKenna, in *Kepner v. United States*,¹⁶⁴ it was argued that it is within the constitutional power of Congress to provide for a writ of error on behalf of the government in criminal trials, whereby errors of law committed in the trial court may be corrected, and, when proper, a new trial of the accused ordered. Though the verdict or judgment may have been in his favor upon the first trial, the accused, it was declared, is not, by the new trial, subjected to a second jeopardy. The jeopardy, it was argued, is one continuing jeopardy, from the beginning to the end of the cause. The principle of the immunity from second jeopardy in its origin, it was declared, was that a trial in a new and independent case could not be had where a man had already been once tried; not that he may not be tried twice in the same case. In fact, the argument continued, he may be tried a second time where the jury disagrees, or the verdict is set aside on the prisoner's bill of errors, or, indeed, he may be tried on a new indictment if the judgment on the first is arrested upon motion.¹⁶⁵

Despite this argument, the weight of authorities, both State and Federal, is overwhelming that, as stated earlier in this chapter, a verdict or judgment in a lower court of competent jurisdiction is final and conclusive as to the defendant. Provision has, however, been made in some of the States, and similar action has recently been taken by Congress, to provide for a review at the instance of the Government in a superior court of questions of law, with, however, the proviso that a verdict in favor of the defendant

¹⁶¹ Citing *United States v. Ball* (163 U. S. 662).

¹⁶² 110 U. S. 574.

¹⁶³ It is to be observed that in the *Trono* case four justices dissented, and Justice Holmes is recorded only as concurring in the result.

¹⁶⁴ 195 U. S. 100.

¹⁶⁵ *Ex parte Lange* (18 Wall. 163).

shall not be set aside. The objection, however, to such a proceeding is not only that it raises in the superior court merely moot questions, but that, irrespective of whether the superior courts will feel themselves bound or even constitutionally qualified to pass upon points with reference to which they are not able to issue any appropriate orders, there is the objection that the defendant, having no reason for contesting them, the decisions will be based upon *ex parte* argument, with all the evils generally recognized as thereupon attending.¹⁶⁶

The Federal act referred to was that of March 2, 1909, which provided as follows: "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." ¹⁶⁷

§ 710. Life or Limb.

The Constitution declares that one shall not twice be placed in jeopardy of "life or limb." This phrase has been construed to mean any punishment. Thus, in *Ex parte Lange* ¹⁶⁸ the court said: "If we reflect that, at the time this maxim came into existence, almost every offense was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied in all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence."

¹⁶⁶ Cf. XX *Columbia Law Review*, 219.

¹⁶⁷ 34 Stat. at L. 1246.

¹⁶⁸ 18 Wall. 163.

§ 711. Self-Incrimination: Immunity from, Not a Requirement of Due Process of Law.

By the Fifth Amendment it is provided: "Nor shall any person be compelled, in any criminal case, to be a witness against himself." The guaranty thus furnished is one independent of the guaranty of "due process of law" and is thus one which, so far as the Federal Constitution is concerned, is not secured to the individual in the State courts. After an elaborate consideration of the meaning of the phrase "due process of law", and an historical review of English practice with reference to the immunity of the accused from self-incrimination, the court, in *Twining v. New Jersey*,¹⁶⁹ said: "We think it is manifest, from this review of the origin, growth, extent and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of *Magna Charta* or the due process of law, which has been an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process but as a wise and beneficent rule of evidence developed in the course of judicial decision." Continuing, the court showed from the circumstances attending the incorporation of the privilege in the Federal Constitution and from the fact that four of the States in their first constitutions did not insist upon the privilege where it would have a much wider application, that it was not considered to be inherent in due process of law. Finally, the court said: "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutory as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham, many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient."¹⁷⁰ It has no place in the jurisprudence of civilized and free countries outside of the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law."

§ 712. Self-Incrimination: What Constitutes.

If an answer will tend merely to disgrace but not to incriminate the witness, the privilege does not apply. If, however, the answer is one which can have no bearing upon the case except to impair the credibility of the witness, he may refuse to answer.¹⁷¹

¹⁶⁹ 211 U. S. 78.

¹⁷⁰ Citing *Wigmore on Evidence*, § 2251.

¹⁷¹ See authorities cited in *Brown v. Walker* (161 U. S. 591).

The immunity which is provided has for its object the protection of the individual against criminal prosecution based upon evidence which has been compulsorily obtained from him. Thus the provision is no bar to the use in a subsequent prosecution of evidence that has been voluntarily given by the accused; nor does it prevent the courts from compelling testimony with reference to acts no longer punishable, or where, by statute, subsequent use of the evidence so obtained in criminal actions has been forbidden. Thus also the immunity does not relate to evidence the tendency of which is merely to discredit the moral character of the witness.¹⁷²

In *Hale v. Henkel* ¹⁷³ the court declared the broad doctrine that the line is drawn at testimony that may expose the witness to criminal prosecution. "If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon, or is guaranteed an immunity, the amendment does not apply. . . . The criminality provided against is a present, not a past criminality, which lingers only as a memory, and involves no present danger of prosecution."

The constitutional privilege against self-incrimination is available to anyone who may be incriminated by the testimony or other evidence that is asked for. It is not limited to a defendant at bar or to party defendants. Furthermore, the constitutional privilege applies as well to testimony or other evidence called for in civil proceedings as in criminal actions. "It applies alike to civil and criminal proceedings, whenever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant." ¹⁷⁴

§ 713. Examination of Voluntary Witnesses.

It is well established that a witness, having voluntarily taken the stand may be compelled to disclose the whole facts regarding the matters concerning which he has testified.¹⁷⁵ In *Fitzpatrick v. United States* ¹⁷⁶ the court said: "When an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the

¹⁷² The State authorities are in conflict as to this.

¹⁷³ 201 U. S. 43.

¹⁷⁴ *McCarthy v. Arndstein* (266 U. S. 34). Cf. *Counselman v. Hitchcock* (142 U. S. 347).

¹⁷⁵ See authorities cited by the court in *Brown v. Walker* (161 U. S. 591 on p. 597).

¹⁷⁶ 178 U. S. 304.

facts which tend in his favor without laying himself open to a cross-examination upon those facts. . . . While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury;¹⁷⁷ and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. . . . He cannot be compelled to answer as to any facts not relevant to his direct examination.”

The foregoing doctrines were reaffirmed in *Sawyer v. United States*.¹⁷⁸

§ 714. Comment on Failure of Accused to Testify.

It is established that the exercise by the accused of his constitutional right not to take the stand in his own defence may not be adversely commented upon by the court or by opposing counsel. When, however, he does elect to testify, but fails to explain in a satisfactory manner incriminating circumstances, that fact may be pointed out to the jury. In *Caminetti v. United States*¹⁷⁹ the court said: “We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, Comp. Stat. 1913, § 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

“When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him.”

In *Burdick v. United States*¹⁸⁰ it was held that the tender of a pardon for the offence involved does not destroy the privilege of a witness against self-incrimination unless the pardon is accepted by him. The court argued that the right of the President to grant pardons and of the witness to refuse to incriminate himself were both sanctioned in the Constitution and should be kept in accommodation,—each in its proper place. “In this as in other conflicts between personal rights and the powers of government, technical—even nice—distinctions are proper to be regarded. Granting, then, that

¹⁷⁷ *State v. Ober* (52 N. H. 459).

¹⁷⁸ 202 U. S. 150. See also, *Powers v. United States* (223 U. S. 303).

¹⁷⁹ 242 U. S. 470.

¹⁸⁰ 236 U. S. 79.

the pardon was legally issued¹⁸¹ and was sufficient for immunity, it was Burdick's right to refuse it . . . , and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal." The court further pointed out in the following words the difference between a legislative provision for immunity, and a pardon such as had been offered: "The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not, like a pardon, requiring him to confess his guilt in order to avoid a conviction of it." This reasoning is, of course, only applicable in a case like the instant one, in which the pardon had been tendered in advance of legal conviction.

§ 715. When Right to Refuse to Testify May Be Claimed.

In 1807 in *Burr's Trial*¹⁸² Chief Justice Marshall laid down the broad doctrine, which has been generally acquiesced in, that where the witness avers under oath that the answer to the question which has been propounded to him will tend to incriminate him, no other testimony may be demanded of him by the court as to this fact. "If the question be of such a description that an answer to it may or may not incriminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not."

The fact that the immunity from prosecution afforded by a Federal statute gives the witness no security from prosecution in the State courts as to matters regarding which he is asked to testify, is immaterial.¹⁸³

§ 716. To Compel Testimony Statutory Immunity Must Be Complete.

Where the right to compel testimony is based upon a statute granting immunity from subsequent prosecution, the immunity granted must be complete. Absolute protection against later criminal actions for the offence to which the testimony relates must be provided. Thus in *Counselman v. Hitchcock*¹⁸⁴ the court held, with reference to testimony before the Inter-

¹⁸¹ The pardon had been issued in advance of conviction or confession or even definition of the possible offence.

¹⁸² *Burr's Trial*, 244.

¹⁸³ *Brown v. Walker* (161 U. S. 591). The converse of this, namely, that because the immunity granted by a State statute to prosecution does not extend to prosecutions in the Federal courts the witness is not excused from testifying, is declared in *Jack v. Kansas* (199 U. S. 372). This doctrine is approved in *Hale v. Henkel* (201 U. S. 43), the court saying: "Indeed, if the argument were a sound one, it might be carried still further and held to apply not only to State prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself." The English doctrine is the same. See *Wigmore on Evidence*.

¹⁸⁴ 142 U. S. 547.

state Commerce Commission, that immunity granted by Section 860 of the Revised Statutes providing that "no evidence given by the witness shall be in any manner used against him in any court of the United States, in any criminal proceeding" was insufficient in that, while it did prohibit the use of the testimony which might be given, it did not prevent a subsequent prosecution of the witness for the offence regarding which he might have been compelled to testify. In order to correct this deficiency in the law, Congress, by act of February 11, 1893,¹⁸⁵ provided that, in the case designated, "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena." ¹⁸⁶

This law was upheld in *Brown v. Walker*.¹⁸⁷

In *Glickstein v. United States* ¹⁸⁸ it was held that the immunity required by the Fifth Amendment relates only to past offences and need not extend to the exemption of a witness from prosecution for perjury committed while testifying. It was therefore held that the immunity clause in the Bankrupt Act of July 1, 1898,¹⁸⁹ did not bar a prosecution for perjury.

In *Heike v. United States* ¹⁹⁰ the petitioner contended that as soon as he had testified upon a matter under the Sherman Act he had an amnesty by the act of February 25, 1903,¹⁹¹ from liability for any and every offence that was connected with that matter in any degree, or, at least, for an offence toward the discovery of which his testimony had led up even though it had, in fact, had no actual effect in bringing the discovery about. This contention the court denied, saying that the evidence in question had not concerned any matter at issue in the instant case. "When," said the court, "the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law."

In *Sherwin v. United States* ¹⁹² it was held that, under the Federal Trade Commission Act,¹⁹³ which provides that no person shall be prosecuted on account of any matter concerning which he may testify or produce evidence

¹⁸⁵ 27 Stat. at L. 443.

¹⁸⁶ "Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

¹⁸⁷ 161 U. S. 591. In *Hale v. Henkel* (201 U. S. 43), a statute of February 25, 1903, was upheld which grants immunity with reference to prosecution under the Anti-Trust Act of 1890. The word "proceeding" as employed in the phrase of the statute that no one should be prosecuted, etc., on account of any testimony given in any "proceeding, suit or prosecution" under the acts enumerated, was held to include examinations before a grand jury.

¹⁸⁸ 222 U. S. 139.

¹⁸⁹ 30 Stat. at L. 548.

¹⁹⁰ 227 U. S. 131.

¹⁹¹ 32 Stat. at L. 904.

¹⁹² 268 U. S. 369.

¹⁹³ 38 Stat. at L. 717.

before the Commission in obedience to a subpoena, a person does not gain such immunity merely by answering, not under oath, inquiries made by the Commission's agent, and giving such agent, without being sworn or served with a subpoena, access to books and papers.

§ 717. Refusal to Produce Books and Papers.

In *Boyd v. United States*¹⁹⁴ the Supreme Court held that the right of the individual to immunity from compulsory self-incrimination includes the right to refuse to produce private books and papers which would have, or tend to have, the effect of incriminating himself.

However, it has been held that this principle does not invalidate a law compelling bankrupts to surrender books and papers.¹⁹⁵ As the court has said in *McCarthy v. Arndstein*:¹⁹⁶ "The cases which hold that a bankrupt must surrender books and papers, although they contain incriminating evidence, rest upon a principle different from that here involved. . . . The law requires a bankrupt to surrender his property. The books and papers of a business are a part of the bankrupt estate.¹⁹⁷ To permit him to retain possession, because surrender might involve disclosure of a crime, would destroy a property right. The constitutional privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property."¹⁹⁸ The court then went on to point out that when a bankrupt appears as a witness before a commissioner, he, like any other witness, can assert his constitutional right to immunity from self-incrimination.¹⁹⁹

§ 718. Corporations Not Protected against Testimony by Their Agents.

In *Hale v. Henkel*²⁰⁰ it was urged that while the immunity statute might protect the individual witness, it would not protect the corporation of which he was the agent and representative. To this the court answered that it was not the intention of the statute to do this nor was there a constitutional necessity that this should be done. The right guaranteed by the Fifth Amendment, it was declared, is purely a personal one of the witness. "It was not intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. . . . If he cannot set up the privilege of a third person, he

¹⁹⁴ 142 U. S. 450.

¹⁹⁵ *Re Harris* (221 U. S. 274); *Johnson v. United States* (228 U. S. 457); *Re Fuller* (262 U. S. 91); *Dier v. Barton* (262 U. S. 147).

¹⁹⁶ 266 U. S. 34.

¹⁹⁷ Section 70a of the Bankruptcy Act of July 1, 1898; 30 Stat. at L. 544.

¹⁹⁸ See also *Johnson v. United States* (228 U. S. 457).

¹⁹⁹ The Bankruptcy Act of 1898 does not grant that complete immunity which is necessary to support compulsory testimony of a self-incriminating character.

²⁰⁰ 201 U. S. 43.

certainly cannot set up the privilege of a corporation." In this case it was held that an officer of a corporation could not refuse to produce the books and papers of the corporation which was charged with a violation of a State or Federal statute. The court said: "The corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It has certain special privileges or franchises, and holds them subject to the laws of the States or the limitations of its charter. . . . Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. . . . It is true that the corporation in this case was chartered under the laws of New Jersey . . . but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce. . . . The powers of the General Government in this particular in the vindication of its own laws are the same as if the corporation had been created by act of Congress." ²⁰¹

In *Baltimore & Ohio R. Co. v. Interstate Commerce Commission* ²⁰² it was held that carriers subject to a statute regulating hours of labor, could not claim the privilege against self-incrimination as a justification for refusing to render monthly reports, under oath, as required by the law, showing the instances where employees had rendered excess service, or where there had been no such instances, making oath to that effect.

In *Consolidated Rendering Co. v. Vermont* ²⁰³ the company had been served with notice to produce certain books and papers which were material evidence upon a subject of inquiry by the grand jury. This, the company had failed to do, and, after a hearing in court, at which opportunity had been given it to set up any reasonable cause for its failure, had been found guilty of contempt and fined accordingly. Upon writ of error to the Supreme Court of the State which had affirmed this judgment for contempt, the United States Supreme Court said, with reference to the claim of the company that its right to immunity from self-incrimination was involved, that, even if the company could take the objection, it appeared that the court below had simply held that until the books and papers were produced it could not determine whether the objection had a substantial basis. "If, after that inspection, any portion were found of that character, the court held that such portion would be excluded. As, however, the company failed and refused absolutely to produce any books, with some unimportant exceptions, it was adjudged to have failed to show any reasonable cause for such refusal to comply with the requirements of the notice and was fined

²⁰¹ See also *Consolidated Rendering Co. v. Vermont* (207 U. S. 541); *Wilson v. United States* (221 U. S. 361); and *Wheeler v. United States* (226 U. S. 478).

²⁰² 221 U. S. 612.

²⁰³ 207 U. S. 541.

for the contempt. Obviously the company could not, by its refusal to produce the books, thereby entirely conclude the court from any examination whatever into the sufficiency of the excuses for such non-production. Otherwise the company could disobey at its pleasure and so prevent any inquiry into the merits of the excuses."

In *Essgee Company v. United States*²⁰⁴ the doctrine was again affirmed that "an officer of a corporation in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt. He does not hold them in his private capacity, and is not, therefore, protected against their production or against a writ requiring him, as agent of the corporation, to produce them. Appellants cite the cases of *Boyd v. United States*,²⁰⁵ *Wicks v. United States*,²⁰⁶ and *Gouled v. United States*²⁰⁷ to support their contention that the proceedings complained of herein violate their rights under the 4th and 5th Amendments. Those cases were all unreasonable searches of documents and records belonging to individuals. The distinction between the cases before us and those cases lies in the more limited application of the amendments to the compulsory production of corporate documents and papers as shown in the *Henkel*, *Wilson* and *Wheeler* cases."

§ 719. Compulsory Taking of Finger Prints, etc.

Though there are no direct cases in the United States Supreme Court upon the point, there are State decisions which support the doctrine that the accused's right to immunity from self-incrimination is not violated when he is compelled to exhibit himself or a part of his body to the jury,²⁰⁸ or to allow a record of his finger prints to be taken.²⁰⁹

The question as to the use that may be made of papers and other evidence unlawfully obtained, will be considered in the next sections dealing with Unreasonable Searches and Seizures.²¹⁰

§ 720. Unreasonable Searches and Seizures.

The question as to the right of the government to compel the production of books and papers is closely connected with the provision of the Fourth Amendment with reference to unreasonable searches and seizures.

The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon prob-

²⁰⁴ 262 U. S. 151.

²⁰⁶ 232 U. S. 383.

²⁰⁵ 116 U. S. 616.

²⁰⁷ 255 U. S. 298.

²⁰⁸ *State v. Ah Chuey* (14 Nev. 79); *Garvey v. State* (52 Miss. 207); *State v. Graham* (74 N. C. 646). But there are decisions *contra*. Cf. 27 *Yale Law Journal*, 412.

²⁰⁹ *People v. Sallow* (165 N. Y. Supp. 915).

²¹⁰ Section 720.

able cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The historical reasons for this constitutional provision are well known. In England, agents of the government, acting under general warrants, had frequently invaded private dwellings in order to obtain evidence against persons charged with committing or suspected of having committed political offences, and the illegality of such general searches had not been determined until the case of *Entick v. Carrington*,²¹¹ decided in 1765. The part played in the American Colonies by writs of assistance which gave to customs officials the right to search any houses they pleased for smuggled goods needs no dwelling upon. It was therefore but natural that, when the adoption of the Constitution which was to provide a strong central government was under discussion, the people should have demanded that, by express provision, the new government should be denied the right to authorize unreasonable searches and seizures. The points to be emphasized regarding this historical basis for the Fourth Amendment are: first, that the apprehension which was felt was with regard to the exercise of oppressive and unreasonable power by the government; and second, that no question was raised as to the admissibility, as legal evidence, of such papers or other materials as might be obtained by searches and seizures, whether reasonable or unreasonable.

It is, however, a rather remarkable fact that it was not until nearly a hundred years after the Constitution had been adopted that the Supreme Court found it necessary to give a careful examination to the Fourth Amendment. This was in the case of *Boyd v. United States*,²¹² decided in 1886, in which, under the act of Congress of June 22, 1874,²¹³ the plaintiffs in error had, against their protest, been required to produce the invoice of certain cases of goods, which invoice had been used as evidence against the plaintiffs upon a charge of defrauding the customs, of which charge they had been convicted. There was thus raised the double issue as to whether the plaintiffs in error had been unconstitutionally compelled to incriminate themselves, and, secondly, whether the compulsory production of the invoice had amounted to an unreasonable search and seizure. In both respects it was held that the rights of the plaintiffs had been unconstitutionally invaded. "It is true," said the court, "that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting; and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of

²¹¹ 19 Howard St. Tr. 1030.

²¹² 116 U. S. 616.

²¹³ 18 Stat. at L. 186.

the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure."

As to the use of evidence thus illegally obtained, the court called attention to the ultimate relation between the provision of the Fourth Amendment regarding unreasonable searches and seizures and that of the Fifth Amendment regarding self-incrimination, and said: "We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. . . . We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal,"—and, therefore, within the operation of the Fourth Amendment.²¹⁴

²¹⁴ The general law relating to the issuance of search warrants is stated by Cooley in the *Constitutional Limitations* (7th ed., 429), as follows: "In the first place they are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or instrument of the crime, is concealed in some specified house or place. And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it. In the next place, the warrant which the magistrate issues must particularly specify the place to be searched and the object for which the search is to be made. . . . The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offence actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. Those special cases are familiar, and well understood in the law. Search-warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books or papers kept for sale or circulation, and for powder or other explosives and dangerous material so kept as to endanger the public safety. A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons,—and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety."

In *Marron v. United States* (275 U. S. 192), the court gave the following summary

The holding of the court in *Boyd v. United States* as to the inadmissibility of evidence illegally obtained has met with much criticism from the bar, the majority of the courts of the States have not followed it in this respect, and the Supreme Court itself has found it desirable to modify it in some regards.

In *Adams v. New York*,²¹⁵ decided in 1904, it seemed as though the *Boyd* doctrine as to inadmissibility was to be substantially repudiated. In this case evidence was held admissible in a criminal proceeding tending to establish the guilt of the accused even though the evidence had been obtained in violation of the constitutional prohibition against unreasonable searches and seizures, and the accused had not taken the witness stand in his own behalf or been compelled to testify regarding the papers which had been seized or to make any admission regarding them. In the opinion rendered in this case the doctrines of the *Boyd* case were not repudiated, but the attempt to distinguish the instant case from that case was a labored and hardly successful one. However, it is not necessary to examine the distinctions that were sought to be drawn since later cases have shown more fully what the court deems to be the true doctrine.

In *Weeks v. United States*,²¹⁶ the Supreme Court again took a strict view of the rights of the government with reference to the securing of evidence, and held that the rights of the accused under the Fourth Amendment had been denied by the refusal of the accused's seasonable application for the return to him of letters and private documents which had been taken from his house during his absence by the United States marshal who had had no warrant for the arrest of the accused and none for the search of his house. Distinguishing this case from the *Adams* case, the court pointed out that, in that case, there had been no application in due season for the return to the accused of the papers which had been illegally seized. The decision in the *Adams* case, the court declared, had rested upon the application of the

of the Federal statutes relating to the things which may be seized by Federal officials under and in pursuance of search warrants: "the Congress in enacting the laws governing the issue and execution of this search warrant was diligent to limit seizures to things particularly described. Section 39 of title 27, U. S. C., provides that such warrant may issue as provided in title 18, §§ 611 to 631 and § 633. Section 613 provides that a search warrant cannot be issued but upon probable cause supported by affidavit naming or describing the person and particularly describing property and place to be searched. Section 622 requires the officer executing the warrant to give to the person in whose possession the property taken was found a receipt specifying it in detail. Section 623 requires him forthwith to return the warrant to the judge or commissioner with a verified inventory and detailed account of the property taken. Section 624 gives the person from whom the property is taken a right to have a copy of the inventory. Section 626 provides that, if it appears that the property or paper taken is not the same as that described in the warrant, the judge or commissioner must cause it to be returned to the person from whom it was taken. And § 631 provides for punishment of an officer who willfully exceeds his authority in executing a search warrant."

²¹⁵ 192 U. S. 585.

²¹⁶ 232 U. S. 383.

parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed, from their commencement, exclusively under the cognizance of the Federal courts.

“On the other hand, some cases, in which an alien or a citizen of another State is made a party, may be brought either in a Federal or a State court at the option of the plaintiff; and if brought in a State court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the Federal courts.

“Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error, after final judgment.

“By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the Judiciary Act could only come under the cognizance of the Federal courts after final judgment in the State courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant.

“The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both State and Federal courts.”

In *Claffin v. Houseman* ⁹ there was a careful consideration of the grounds upon which the proposition and practice might be established of permitting State courts to exercise jurisdiction with regard to cases which are within the Federal judicial power but which had not been declared by the Constitution or Federal statute to be exclusively vested in the Federal courts. In this case it was held that an assignee in bankruptcy might, under the Federal Bankruptcy act of 1867, sue in a State court to recover the assets of the bankrupt. This concurrence of jurisdiction between the Federal and State courts the court founded upon the fact that while every citizen of a State is a subject of two distinct sovereignties, these sovereignties are not foreign to each other but have concurrent authority as to place and persons though distinct as to subject-matters. Therefore, as the court said: “Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent

⁹ 93 U. S. 130.

to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under the law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction."

§ 804. Federal Corporations.

Generally speaking, when a corporation created by Federal law is a party to a suit, the cause is viewed as one arising under a law of the United States, and, therefore, Federal jurisdiction attaches. However, Congress has specifically provided that no suit may be brought by or against a railroad solely upon the ground that it is incorporated by act of Congress;¹⁰ and, by Section 12 of the act of February 12, 1925,¹¹ it is provided that "no District Court shall have jurisdiction of any action or suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: *Provided*, that this section shall not apply to any suit, action, or proceeding brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one half of its capital stock."

§ 805. National Banks.

Congress has also declared that National Banks shall, as regards suits by or against them, be regarded as citizens of the States in which they are located, and, herefore, such suits may not be instituted in Federal courts unless, upon grounds other than that of their status as Federal institutions, Federal jurisdiction attaches.¹²

§ 806. Cases in which Federal Jurisdiction Made Exclusive.

As will later appear¹³ the Federal jurisdiction in admiralty causes is necessarily exclusive in character. However, as will also appear, this fact does not prevent parties from litigating disputes which have their origin in maritime transactions, provided they are willing to accept such relief as the State courts, under State law, are competent to give.

Prize cases have, by Congress, been placed within the exclusive jurisdiction of the Federal courts.

Similarly, exclusive Federal jurisdiction has been provided for all cases arising under the Patent, Copyright and Bankruptcy laws of Congress.

The Federal courts have exclusive jurisdiction in all cases in which the United States is a party, to controversies between the States of the Union, and to suits by a State against citizens of another State.

¹⁰ Act of January 28, 1915; 38 Stat. at L. 804.

¹¹ 43 Stat. at L. 936.

¹² The foregoing does not apply to receivers of National Banks, who are regarded as officers of the United States. *Murray v. Chambers* (151 Fed. Rep. 142).

¹³ *Post* Chapter LXXIV.

Jurisdiction over suits affecting ambassadors, other public ministers and consuls is exclusive in the Federal courts. Though not so stated in the Constitution, it is established that these suits are only such as affect the diplomatic and consular representatives accredited to the United States by foreign powers, and do not include those affecting representatives of the United States.¹⁴

§ 807. Ancillary Powers of Federal Courts.

From the fact that all Federal courts are courts of limited jurisdiction, it results that, in cases brought before them, the records must show affirmatively the grounds upon which the Federal jurisdiction is claimed to exist.

However, the Federal courts have been held to possess, by necessary implication, and without express congressional grant, the powers necessary to maintain their own dignity and order, including the power to punish for contempts, and to make rules governing their own procedure.¹⁵ These rights are, however, subject to be limited or regulated by Congress, as has been done in a number of ways. Thus, for example, Section 268 of the Judicial Code provides that the power of the Federal courts to punish for contempts shall not extend "to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."¹⁶

§ 808. Habeas Corpus: Power of Federal Courts to Issue Writs of.

Congress has provided in express terms that the Supreme Court, its several justices, the Circuit Courts of Appeal and their several judges and the District Courts shall have the power to issue writs of habeas corpus.¹⁷ It is, however, provided that the writ shall in no case extend to a prisoner in jail unless where he is in custody under or by color of authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United

¹⁴ *Milward v. McSaul* (Fed. Cas. 9624). Confirming this doctrine in *Ex parte Gruber* (269 U. S. 302), the Supreme Court said: "The provision [of the Constitution], no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege not of the official, but of the sovereign or government which he represents, accorded from high considerations of public policy—considerations which plainly do not apply to the United States in its own territory." Citing *Davis v. Packard* (7 Pet. 276); *Marshall v. Critico* (9 East. 447); *Valarino v. Thompson* (7 N. Y. 576).

¹⁵ *United States v. Hudson* (7 Cr. 32).

¹⁶ For a consideration of the extent to which Congress may constitutionally limit the Federal courts in the exercise of their several jurisdictions, see Chapter LXXXVIII.

¹⁷ Rev. Stat. Sections 751, 752.

States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States, or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted to be done under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations;¹⁸ or unless it is necessary to bring the prisoner into court to testify.”¹⁹

It has been held that the authority given to the Supreme Court to issue the writ enables it to do so only as ancillary to its original jurisdiction or when the questions raised are of an appellate nature²⁰ and, in general, it may be said that the Federal courts will decline to issue the writ except when necessary to uphold an asserted Federal right. Thus, in *Duncan v. McCall*,²¹ the court refused to issue the writ to release a prisoner in a State court in advance of the decision by the court from which an appeal might be taken to the Federal courts in order to correct any denial thereby of a Federal right. Thus, in general, the Federal courts have refused to employ the writ in place of an appeal upon writ of error to correct mere procedural errors.²²

With regard to the use of the writ in extradition proceedings, the Supreme Court, in a comparatively recent case,²³ has said: “It is not a means for rehearing what the magistrate has already decided. The alleged fugitive from justice has had his hearing, and habeas corpus is available only to inquire: (1) Whether the magistrate had jurisdiction, (2) Whether the offence charged is within the [extradition] treaty, and, by a somewhat liberal extension, (3) Whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.”²⁴

In general, with reference to persons in the custody of State officials, it may be said that the Federal courts issue the writ: (1) after indictment or even conviction, to test the jurisdiction of the State court, upon the ground that the State law purporting to give the jurisdiction is unconstitutional as tested by the Federal Constitution;²⁵ and (2) before con-

¹⁸ The possible embarrassments arising out of the lack of such a provision became apparent at the time of the *McLeod* case.

¹⁹ Rev. Stat. Section 453.

²⁰ *Ex parte Clarke* (100 U. S. 399).

²¹ 139 U. S. 449.

²² The cases upon this point are many, but among them may be cited *Ex parte Harding* (120 U. S. 782); *Valentine v. Mercer* (201 U. S. 131); *Henry v. Henkel* (235 U. S. 219); *Frank v. Mangum* (237 U. S. 309); *Knewel v. Egan* (268 U. S. 442).

²³ *Fernandez v. Phillips* (268 U. S. 311).

²⁴ For an excellent general account of Habeas Corpus in the Federal Courts, see the article of this title by A. M. Dobie in 13 *Virginia Law Review*, 433.

²⁵ As in *Ex parte Siebold* (100 U. S. 371).

viction, when the accused sets up a Federal authority for the act charged against him. In such cases the Federal court will try the whole case and either release the prisoner or remand him to the State authorities.²⁶

²⁶ In the case of Federal revenue officers there is a special Federal statute which provides that, when there is alleged a Federal right to do the act charged against him, he may have the case removed, even before indictment, to the Federal courts. Judicial Code, Section 33.

The following account of the reasons leading up to the progressive extension by Congress of the authority of the Federal courts to issue writs of habeas corpus deserves quotation from the opinion of the court in *Re Neagle* (135 U. S. 1).

"The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempts of the states of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the states denied. The original act of Congress on the subject of the writ of *habeas corpus*, by its 14th section, authorized the judges and courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question, or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the states. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833, 4 Stat. 634, c. 57, § 7, among other remedies for such condition of affairs, provided by the 7th section, that the federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

"The next extension of the circumstances on which a writ of *habeas corpus* might issue by the federal judges arose out of the celebrated *McLeod Case*, in which McLeod, charged with murder in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the federal judges under the writ of *habeas corpus*, by the act of Aug. 29, 1842, 5 Stat. 539, c. 257, entitled 'An act to provide further remedial justice in the courts of the United States.' It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill which afterwards became a law on this subject, Senator Berrien, who introduced it into the Senate, observed: 'The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed

§ 809. The States May Not Control or Limit the Exercise of Federal Judicial Power.

The jurisdiction of all Federal courts is a limited one, being circumscribed by the provisions of the Federal Constitution and the statutes of Congress in pursuance thereof, and it scarcely needs be said that, in the exercise of this jurisdiction, these courts are not subject to the control of State law, nor is State law competent to add to or subtract from that jurisdiction. Thus it has been held that the distinction between law and equity, which is recognized by the Constitution in the provision that the Federal judicial power shall extend to all cases "in law and equity" arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, will be adhered to by the Federal courts even when they are called upon to enforce the laws of States which, by statute, have weakened or abolished that distinction as established by the common law. In *Scott v. Neely*,²⁷ in which it was sought to maintain in a Federal court a new equitable right created by a statute of the State of Mississippi, the effect of which was to deprive the defendant of a trial at law with the accompanying right to a jury, the court said: "The general proposition, as to the enforcement in the Federal courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the States by whose legislation it is created." The court then, quoting from the opinion

under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief.' No more forcible statement of the principle on which the law of the case now before us stands can be made.

"The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867, 14 Stat. 385, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that 'the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty.' "

²⁷ 140 U. S. 106.

in *Bennett v. Butterworth*,²⁸ said: "Although the forms of proceedings and practice in the State courts have been adopted in the [Federal] District Court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended in one suit. The Constitution of the United States, in creating and defining the judicial power of the General Government, establishes this distinction between law and equity: and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State Court. But if the claim is an equitable one, he must proceed according to the rules which this court has prescribed (under authority of the act of August 23d, 1842) regulating proceedings in equity in the courts of the United States."²⁹

The extent to which State laws are applied, and State judicial practice followed, in the Federal courts is more fully discussed in a later section.³⁰

That a State cannot withdraw from Federal judicial cognizance a matter or cause coming within that cognizance as fixed by the Constitution and laws of Congress is fully established. Thus, in *Chicago and Northwestern R. Co. v. Whitton*,³¹ to the contention that the remedy sought, which had been provided by a State statute, could, according to that statute, be sought only in the courts of the State, the Supreme Court said: "It is undoubtedly true that the right of action exists only in virtue of the [State] statute. . . . In all cases, when a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court. The statutes of nearly every State provide for the institution of numerous suits, such as for partition, foreclosure, and recovery of real property in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation."

The question as to the right of States to prevent foreign corporations doing business within their borders to resort to the Federal courts is elsewhere considered.³²

²⁸ 11 How. 669.

²⁹ See also *Cates v. Allen* (149 U. S. 451) and *Hollins v. Brierfield Coal and Iron Co.* (150 U. S. 371), reaffirming this doctrine.

³⁰ See Chapter LXXII.

³¹ 13 Wall. 270.

³² See Chapter IX.

§ 810. Federal Question.

The Constitution provides that the Federal judicial power shall extend to "all cases, in law or equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

In order that Federal judicial power may attach under this grant it is necessary that the controversy shall constitute what in law is technically known as a "case"; and that, for its decision, the enforcement of some Federal right is substantially involved.³³

A case is not brought within Federal judicial cognizance simply because, in the progress of the litigation, it becomes necessary to refer to or give a construction to the Federal Constitution or laws of the United States. "The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."³⁴

In *Cableman v. Peoria, etc., R. R. Co.*³⁵ it is held that the bare fact that the appointment of a receiver is by a Federal court does not make all actions against him cases arising under the Constitution or laws of the United States which he can remove on that ground into the Federal court, unless his appointment has been not under the general equity powers of a chancery court, but pursuant to a special Federal law. The court, citing previous cases, said: "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must

³³ In *Osborn v. Bank of United States* (9 Wh. 738), Chief Justice Marshall said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. The power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."

³⁴ *Gold Washing & Water Co. v. Keyes* (6 Otto, 199). In *McCoy v. Shaw*, decided May 21, 1928, it was held that a judgment of a State court put upon a non-Federal ground, independent of the Federal question involved, and broad enough to sustain the judgment, could not be reviewed by the Supreme Court unless the non-Federal ground was so plainly unfounded that it might be regarded as arbitrary or as clearly a mere device to prevent a review of the decision upon the Federal question.

³⁵ 179 U. S. 335. The ordinary rule is that no receiver may be sued except by leave of the court which appointed him, but Congress has provided that every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed.

appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained."

But the Federal judicial power attaches when it is shown that a Federal right is substantially involved, whether express or implied: "The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied, by and under the Constitution and laws of the United States. Those courts are created courts of common law and equity; and under whichsoever of these classes of jurisprudence such rights and duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong."³⁶

In *Shoshone Mining Co. v. Rutter*³⁷ the general extent of the Federal judiciary power as determined by subject matter rather than diversity of citizenship, is stated and the authorities reviewed.

Until 1875 Congress did not give to the inferior Federal courts, as it might have done, jurisdiction in all cases arising under the Constitution, laws and treaties of the United States, but left such Federal questions as might arise in the course of litigation to be finally determined by the Supreme Court upon appeal from or writ of error to the State courts in which the cases were heard. Therefore, up to that time, the cases in the Supreme Court in which the existence of a Federal right was concerned turned upon the constitutionality of the acts of Congress which had provided for this appellate review, or which, in specific instances, provided that the Federal courts might have original jurisdiction. Thus, in *Martin v. Hunter's Lessee*,³⁸ and *Cohens v. Virginia*³⁹ the question was as to the constitutionality of the twenty-fifth section of the Judiciary Act of 1789; in *Osborn v. United States Bank*,⁴⁰ the question was as to constitutionality of the act of Congress which declared that the bank might sue or be sued in the Federal Circuit Court; and, in *The Moses Taylor*,⁴¹ it was as to the exclusiveness of the Fed-

³⁶ *Irvine v. Marshall* (20 How. 558; 15 L. ed. 994).

³⁷ 177 U. S. 505. See also, *New Orleans v. Benjamin* (153 U. S. 411); *Blackburn v. Portland Gold Mining Co.* (175 U. S. 571); *Western Union Tel. Co. v. Ann Arbor R. Co.* (178 U. S. 239); *Joy v. St. Louis* (201 U. S. 332); *Devine v. Los Angeles* (202 U. S. 313); *Louisville & N. R. Co. v. Mottley* (211 U. S. 149). In this last case the court said: "It is not enough that the plaintiff alleges some anticipated defence to his cause of action and asserts that the defence is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's cause of action, arises under the Constitution."

³⁸ 1 Wh. 306.

³⁹ 6 Wh. 264.

⁴⁰ 9 Wh. 802.

⁴¹ 4 Wall. 411.

eral jurisdiction in admiralty matters; in *Claffin v. Houseman*,⁴² it was as to exclusiveness of the Federal jurisdiction in proceedings in bankruptcy; in *Tennessee v. Davis*,⁴³ it was as to the constitutionality of the act authorizing the removal into the Federal courts of criminal prosecutions begun against a revenue officer of the United States.⁴⁴

By the act of March 3, 1875,⁴⁵ the Federal District Courts were given original jurisdiction over all cases arising under the Constitution or laws of the United States or treaties made or to be made, under their authority, and this provision has continued to the present day. Since 1875, therefore, the question has been, not as to the constitutionality of acts of Congress providing for jurisdiction in the Federal courts, but as to whether, in the instant cases, a question thus arising has been involved.

In order that a case may be brought within the scope of the Federal judicial power, it is sufficient that it involve as one of its ingredients a matter falling within the terms of Section 2 of Article III of the Constitution. This doctrine was laid down by Chief Justice Marshall in *Osborn v. United States*.⁴⁶ He there said: "A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the parties may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. . . . We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Unless the Federal right basis appears in the record, that is, unless a right, privilege, authority, or immunity arising under the Federal Constitution or the law or treaties of the United States is set up, by the plaintiff or complainant, Federal jurisdiction will not attach. The fact that the de-

⁴² 93 U. S. 130.

⁴³ 100 U. S. 257.

⁴⁴ Cf. the article "When Does a Case Arise Under Federal Laws" by C. A. Williard, in 45 *American Law Review*, 373.

⁴⁵ 18 Stat. at L. 470.

⁴⁶ 9 Wh. 737.

fendant may set up a Federal right, privilege, or immunity is not sufficient, for the case must arise under the Federal Constitution, treaties or laws.

In *Starin v. New York City*,⁴⁷ we find Chief Justice Waite defining a "Federal question" as follows: "The character of a case is determined by the questions involved. If, from the questions, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States . . . otherwise not."

If the plaintiff or complainant does not himself set up the Federal right, privilege or immunity, Federal jurisdiction will not attach by reason of an allegation of what the defendant may or will set up by way of defence.⁴⁸

An inspection of the provisions of the judicial code with reference to the matter shows that in none of the cases in which the jurisdiction of the Federal courts is based upon the existence of a Federal question, is there a limitation as to the amount of money or value of property that must be involved.

In *Henry v. Dick Co.*⁴⁹ the court pointed out how it may often depend upon what remedy a complainant is seeking whether a right arising, or claimed to arise, under a Federal law is involved. Thus, in this case, the complainant might have sued in the State courts upon a broken contract, or for its enforcement, but, instead, brought action for infringement of a patent right, which, being a right created by Federal law, he was entitled to enforce in the Federal courts.

§ 811. Removal of Suits from State to Federal Courts.

The protection of Federal law and Federal rights against possible invasion by State law and State authorities may be secured in three ways. First, by vesting in the Federal courts exclusive cognizance of all cases in which the enforcement of Federal rights created or recognized by the Constitution, treaties, or congressional statutes, is involved; Second, by providing that all cases, involving these rights, which originate and are prosecuted in the State courts may be finally appealed to the Federal courts; and, Third, by providing that such cases begun in the State courts may at some stage prior to final judgment therein, be removed into the Federal courts. All these methods have been employed since the beginning of the present government.

In the early years under the Constitution chief reliance for the ultimate protection of Federal rights against State invasion was laid upon the right of appeal to the Supreme Court of the United States by writ of error to

⁴⁷ 115 U. S. 248.

⁴⁸ *Devine v. Los Angeles* (202 U. S. 313).

⁴⁹ 224 U. S. 1.

the State courts having final jurisdiction of a case in which Federal rights, privileges, and immunities were involved, and in which the final decision was adverse to the Federal rights, privileges, and immunities claimed. With respect to very many matters of which jurisdiction might have been granted to the inferior Federal courts, no such jurisdiction was given by Congress to the Federal courts, these suits being left to the adjudication of the State courts, with the provision that certain cases might be removed into the Federal courts, and that in all cases not so removed or removable, appeal might be had to the Federal Supreme Court when the final State judgment was adverse to the alleged Federal right, privilege, or immunity.⁵⁰

§ 812. Statutory Provisions for Removal from State to Federal Courts.

By the original Judiciary Act of 1789 it was provided that suits brought in State courts might be removed into the Federal courts only in case all the necessary defendants were aliens or all the necessary plaintiffs were citizens of the State and all the necessary defendants were citizens of another State and all joined in the petition for removal. By the act of 1866 individual defendants were permitted to remove if their interests could be properly adjudicated without the presence of the other defendants.

By act of 1867 either a plaintiff or defendant could remove upon affidavit that local prejudice would prevent a fair trial. By act of 1887 this right was limited to the defendant. By act of 1875 it was declared that either defendant or plaintiff might remove any case of which the Federal Circuit and the State courts had concurrent jurisdiction. By acts of 1887 and 1888 the jurisdiction of the Circuit Courts was considerably reduced, which of course had the effect of reducing the rights of removal provided for by the act of 1875.

The laws at present governing removal of suits to the Federal Circuit Courts are the act of August 13, 1888,⁵¹ and Sections 641, 642, 643 of the Revised Statutes, as embodied in Section 28 (as amended) of the Judicial Code.

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or

⁵⁰ It would seem that Congress has the power to provide that this right of appeal from a State court may be had to an inferior Federal court, but quite properly, in order to save as far as possible the States' sensibilities, an appeal only to the highest Federal court has been allowed. And furthermore, as we have seen, this appeal for a long time lay only in those cases where the decision of the State court had been adverse to the Federal right, privilege or immunity.

⁵¹ 25 Stat. at L. 433; Judicial Code, Sections 28-39.

in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause. If it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit in any district court which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.”⁵²

⁵² Mere allegation of local influence or prejudice is not sufficient. There must be presented some legal proof, as, for instance, the affidavit of a creditable person. *In re Pennsylvania Co.* (137 U. S. 451). There are provisos, declaring not removable cases arising under the Federal statutes relating to the liability of intrastate carriers to their employees, and also cases against such carriers for damages for delay, loss or injury to property carried, unless \$3000 be involved.

By Section 31 of the Judicial Code it is provided that: "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial, into the next district court to be held in the district where it is pending."⁵³

Section 33 of the Judicial Code, as amended, provides also that: "When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of any thing done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon petition of such defendant to said district court." The section goes on to provide for issuance of writ by habeas corpus by the Federal court to obtain the custody of the defendant.

⁵³ This section goes on to provide that it shall be the duty of the clerk of the State court to furnish the defendant, petitioning for removal, with copies of the process against him, all pleadings, depositions, testimony, etc., and that if the clerk shall neglect or refuse to do this, the Federal court may require the plaintiff to file a declaration, petition, or complaint in the cause, and in case of this default, may order a non-suit and dismiss the case at the costs of the plaintiff, and that such dismissal shall be a bar to any further suit touching the matter in controversy. Section 642 provides for the issuance of the writ of habeas corpus to obtain the custody of the defendant. A valuable discussion of the scope and intent of these sections is to be found in *Kentucky v. Powers* (201 U. S. 1).

§ 813. Mandamus to Remand to State Courts Causes Improperly Removed to Federal Courts.

In *Maryland v. Soper* ⁵⁴ it was held by the Supreme Court, in exercise of its original jurisdiction, upon suit of the State of Maryland, that a mandamus might properly issue to a lower Federal court to remand to the courts of that State a cause which the lower Federal court had held was removable from the State courts to itself, but which the Supreme Court held to be not properly so removable.

§ 814. Jurisdiction of Federal Courts Based upon Diversity of Citizenship.

By the Constitution jurisdiction in the Federal courts may be founded upon either the subject matters enumerated in Article III, or upon the character of the parties, that is, where the controversy is one to which the United States is a party, or between two or more States, between a State and citizens of another State, between citizens of different States, or between a State or a citizen thereof and foreign States, citizens or subjects.

Within the meaning of the clause of the Constitution extending the Federal judicial power to suits between citizens of different States it has been held that any person who is a citizen of the United States, native or naturalized, is a citizen of the State in which he is domiciled.⁵⁵

United States citizens domiciled in the Territories or the District of Columbia do not come within this rule.⁵⁶

In *Strawbridge v. Curtis* ⁵⁷ it was held that if there be two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must, by reason of citizenship of another State, be capable of suing each of the defendants in a Federal court, in order to sustain the Federal jurisdiction. This doctrine, thus declared, has never been departed from.⁵⁸

In *Supreme Tribe of Ben Hur v. Cauble*,^{58a} it was held that the jurisdiction of a Federal District Court was not defeated by the intervention as plaintiffs of other members of a class of persons who were citizens of the same State as the defendants; and that, having properly acquired jurisdiction by reason of the diversity of the citizenship of the original parties, and having proceeded to a final decree, the court might, without regard to their citizenship, enjoin other members of the class from maintaining suits in State courts to relitigate the questions settled by the Federal decree.

In *Niles-Bement-Pond Co. v. Iron Moulders' Union*,^{58b} the Federal court refused to take jurisdiction when it appeared that a defendant corporation was wholly controlled by a plaintiff corporation, and, therefore, that

⁵⁴ 270 U. S. 9 and 36.

⁵⁵ Mere residence in a State is not sufficient. *Neel v. Penn. Co.* (157 U. S. 153).

⁵⁶ *New Orleans v. Winter* (1 Wh. 91); *Hepburn v. Ellzey* (2 Cr. 445).

⁵⁷ 3 Cr. 267.

⁵⁸ See *Hooe v. Jamieson* (166 U. S. 395), and cases there cited.

^{58a} 255 U. S. 356.

^{58b} 254 U. S. 77.

there was no real collision of interest between them, so that it might be made a plaintiff in the case, with the result that one of the plaintiffs would be a citizen of the same State as the defendant.

§ 815. Citizenship of Corporations.

It was early decided that a corporation is not a citizen within the meaning of the clause providing that the Federal judicial power shall extend to controversies between citizens of different States, and, in theory, this is still the law; but if each corporation were conclusively presumed to be a citizen of the State by which it is chartered the practical results would be precisely the same as it now is and for many years has in fact been. Until about 1840, however, the doctrine prevailed that a corporation being an artificial unit, the court would look behind its corporate personality to see whether the individuals of which it was composed were, each and every one of them, citizens of a State different from that of each of the parties sued.⁵⁹ But in later cases this doctrine was repudiated, and the principle stated, first, that the citizenship of the individuals composing the corporation is to be presumed to be that of the State by which the company was chartered, and, still later, that this presumption is one that may not be rebutted. In *Ohio & Mississippi R. R. Co. v. Wheeler*⁶⁰ the court said, citing *Louisville, C. & C. R. R. Co. v. Letson*:⁶¹ "Where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States."

This presumption, conclusive as to the citizenship of the corporation, is no presumption at all as to the citizenship of one of the individual stockholders in case that individual stockholder sues or is sued by the corporation even when such suit is brought to enforce rights or liabilities directly resulting from his relation as a stockholder. In such case a stockholder, if a plaintiff, may assert that he is a citizen of the State in which his citizenship actually is, and he may describe himself as a stockholder of the defendant corporation and yet the Federal courts will conclusively presume that every stockholder of the defendant corporation is a citizen of the same State as that which chartered the corporation.

A corporation created by the concurrent action of two or more States is foreign to each of them. This was so held in *Nashua, etc., R. Co. v.*

⁵⁹ *Bank of United States v. Deveaux* (5 Cr. 61); *Bank of Vicksburg v. Slocumb* (14 Pet. 60).

⁶⁰ 1 Black, 286.

⁶¹ 2 How. 497.

Boston, etc., R. Co.⁶² It thus would seem that a corporation which has obtained a charter from two States can, if sued in either one of them, remove into the Federal courts on the ground that it is a citizen of the other State. Reciprocally, being regarded as a citizen of each of the States from which it has obtained a charter, a corporation cannot claim diversity of citizenship when it sues a citizen of any one of those States.⁶³

The fiction as to the citizenship of a corporation, as applied to Federal jurisdiction based upon diversity of citizenship, has not been applied to joint-stock companies, partnerships, etc.⁶⁴

In *St. Louis & San Francisco Ry. v. James*⁶⁵ the doctrine was advanced, but rejected by the court, that a corporation chartered in one State and authorized by the law of another State to do business therein and to have there all the privileges of a domestic corporation, might, as a citizen of the latter State, bring a suit in the Federal courts against a citizen of the State of its incorporation.⁶⁶

§ 816. National Banks.

When the present national banking system was established, and for more than twenty years afterwards, an express statute authorized the National Banks to sue and be sued in the Federal courts. Since 1887 it has been provided by law that for the purposes of the jurisdiction of the Federal courts national banks are to be held to be citizens of the States in which they are respectively located, and the Federal courts have, in general, no other jurisdiction over controversies to which they are a party than they would have were such banks citizens of such States.⁶⁷

§ 817. Federally Chartered Corporations.

It has been held that a corporation chartered by the United States, except as specifically restricted by Congress, has the right to invoke jurisdiction of the Federal courts in respect to any litigation which it may have.⁶⁸

§ 818. Fictitious Citizenship.

Federal jurisdiction may not be created by the fictitious assignment of the cause of action, but, where the transfer is real, and for a consideration, Federal jurisdiction will attach even though the transfer is shown to have

⁶² 136 U. S. 356. See also *Patch v. Wabash R. Co.* (207 U. S. 277).

⁶³ *Ohio & Miss. R. Co. v. Wheeler* (1 Black, 286).

⁶⁴ *Chapman v. Barney* (129 U. S. 677); *Great Southern Hotel Co. v. Jones* (177 U. S. 450).

⁶⁵ 161 U. S. 545.

⁶⁶ See also *Martin v. B. & O. Ry.* (151 U. S. 673); *Southern Pacific Ry. v. Denton* (146 U. S. 202).

⁶⁷ 24 Stat. at L. 552.

⁶⁸ *Osborn v. Bank of United States* (9 Wh. 738); *Pacific Railroad Removal cases* (115 U. S. 1).

been made with this end in view. In *Dickerman v. Northern Trust Co.*⁶⁹ the court said: "It is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appears to be a real transaction, the court will not, in deciding the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. The law is equally well settled that, if a person take up a *bona fide* residence in another State, he may sue in a Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the court was held." ⁷⁰

In order that there may be Federal jurisdiction, mere diversity of residence is not sufficient. There must be diversity of citizenship, and this fact must affirmatively appear in the pleadings.⁷¹

§ 819. Nominal Parties.

Generally with regard to Federal jurisdiction based upon diversity of citizenship it may be said that the citizenship of purely nominal parties is disregarded, and that of the real parties in interest is held determinative.⁷² But this rule does not apply to administrators, executors, trustees and others suing in a representative capacity. In their case, their citizenship is material.⁷³

§ 820. Suits Between Aliens and American Citizens.

By Section 24 of the Judicial Code, the District Courts are given jurisdiction of cases in which the matter in controversy exceeds \$3000 and in which the parties are citizens of a State of the Union upon the one side and citizens or subjects of foreign States upon the other side. In these cases the residence of the alien parties is not material.⁷⁴ Stockholders of foreign corporations are conclusively presumed to be aliens, and thus foreign corporations are brought within the scope of Section 24 of the Judicial Code.⁷⁵

§ 821. Suits Between Aliens.

When both parties to a suit are aliens the Federal courts have no jurisdiction except such as may be derived from the subject matter involved.⁷⁶

⁶⁹ 176 U. S. 181.

⁷⁰ Citing *Cheever v. Wilson* (9 Wall. 108). See also *Williamson v. Osenton* (232 U. S. 619).

⁷¹ *Wood v. Wagon* (2 Cr. 9); *Wolfe v. Hartford Life Insurance Co.* (148 U. S. 389).

⁷² *Browne v. Strode* (5 Cr. 303).

⁷³ *Coal Co. v. Blatchford* (11 Wall. 174).

⁷⁴ *Breedlove v. Nicolet* (7 Peters, 428).

⁷⁵ *Steamship Co. v. Tugman* (106 U. S. 118).

⁷⁶ *Montalet v. Murray* (4 Cr. 46); *Hodgson v. Bowerbank* (5 Cr. 303).

§ 822. Foreign States as Plaintiffs.

The right of a foreign State or of its sovereign to sue in the Federal courts is expressly recognized in the Constitution, and has been provided for in the Judicial Code.⁷⁷

§ 823. Suits Between a State and Its Own Citizens.

The Supreme Court has refused to take original jurisdiction of a suit between a State and a citizen of another State, when, with the latter, it was necessary to join a citizen or citizens of the complainant State.⁷⁸

⁷⁷ *The Sapphire* (11 Wall. 164).

⁷⁸ *Minnesota v. Northern Securities Co.* (184 U. S. 199).

CHAPTER LXXII

THE LAW ADMINISTERED BY THE FEDERAL COURTS

In the chapters which have gone before consideration has been given to the organization and fields of jurisdiction of the Federal courts. We have now to consider the law which they apply.

In all cases, where applicable, as determined by the nature of the matters litigated, the Federal courts of course apply Federal statutes and treaties and the provisions of the Federal Constitution so far as they are self-executory. Also, and as will later be more specifically considered ¹ the Federal courts apply those principles of International Law which the United States has expressly or by necessary implication accepted. As will also be shown, in suits in which the Federal jurisdiction is based upon the diversity of citizenship of the parties thereto, the Federal courts, in certain cases, have recognized the existence of, and by their decisions have developed, a body of general jurisprudential principles which do not necessarily correspond with the common-law principles of any of the States of the Union; and also, in suits between States of the Union, the Supreme Court has, from necessity, found itself compelled to develop a system of "interstate common law." ²

The foregoing are instances of the faculty or power possessed by the Federal courts to build up, by their own decisions, systems of non-statutory or common law. However, the question which will be first considered is as to

¹ See § 840.

² See especially the case of *Kansas v. Colorado* (206 U. S. 46) in which the common law of the two States with reference to the matter in controversy was divergent. The Supreme Court held that it was not entitled to impose the law of either State upon the other, and that it would therefore declare for itself what the common law in the premises should be held to be. The court said: "One cardinal rule underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois* (180 U. S. 208), the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. . . . If the two States were absolutely independent nations, it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court."

the power of Congress to provide the law to be applied by the Federal courts.

There is naturally no doubt as to the legislative power of Congress with regard to subjects which, by the Constitution, have been expressly, or by implication, placed within the control of the Federal Government. There is a question, however, as to the extent to which a Federal legislative power can be deduced from a simple grant of Federal judicial power.

§ 824. Procedural or Adjective Law.

That Congress has the power to provide the laws necessary for the establishment of the Federal courts, for endowing them with authority to regulate their own practice and procedure and to issue and enforce by contempt proceedings the writs and other orders required for exercising their jurisdiction and for maintaining their own dignity and order, there is no doubt. Indeed, certain of these powers have been held to be inherent in the courts, that is, necessarily possessed by them because of the fact that they are courts. In the very early case of *United States v. Hudson* ³ the court said: "Certain implied powers must necessarily result to our courts of justice from the nature of their institution. . . . To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute." ⁴ Nor is there any doubt as to the power of Congress to provide for and authorize the exercise of all executive and

³ 7 Cr. 32.

⁴ How far it is constitutional for Congress to limit these powers or determine the manner in which they shall be exercised by the courts, is a question of some difficulty. By the Clayton Act of 1914 (38 Stat. at. L. 738) it was mandatorily provided that a jury trial should be had in certain specified kinds of contempt. This provision was held unconstitutional in a lower Federal court in *Michaelson v. United States*, on the ground that the power of a court to vindicate or enforce its decrees in equity was inherent and indefeasible. The Supreme Court, however, held (266 U. S. 42) that the statutory provision had related only to criminal and not to civil contempts, and that it was proper for Congress to provide that criminal contempts should be in conformity with the practice in criminal cases. "If," said the court, "the reach of the statute had extended to the cases which are excluded, a different and more serious question would arise." Earlier in its opinion, the court had said: "That the power to punish for contempts is inherent in all courts has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power." The court added, "So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress (citing *Ex parte Robinson*, 19 Wall. 505); *Bessette v. W. B. Conkey Co.* (194 U. S. 324); but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted."

administrative means for the protection of the Federal courts and their justices,⁵ and for the enforcement of their orders, decrees and judgments.

In general, then, it may be said that Congress may itself provide, or may authorize the courts to provide, the procedural or adjective law for the exercise of the Federal judicial power. Thus, in *Wayman v. Southard*,⁶ to the contention that Congress could not regulate the conduct of officers in the service of executions on judgments rendered in the Federal courts, since this was a matter within the exclusive control of the State legislatures, Chief Justice Marshall replied: "The court cannot accede to this novel construction. . . . The judicial department [of the Federal Government] is invested with jurisdiction in certain specified cases, in all of which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial power has power to pronounce, is expressly conferred by this clause (Article I, section 8, (clause 18)), seems to be one of those plain propositions which reasoning cannot render plainer. . . . The court, therefore, will only say, that no doubt whatever is entertained on the power of Congress over the subject."

§ 825. Substantive Law.

Turning now from adjective to substantive statute law it is to be noted that, in maritime and admiralty matters, the constitutional grant of judicial power has been held to carry with it a grant of legislative power to supply the law which is to be applied. This doctrine is elsewhere discussed in more detail,⁷ but it may be here pointed out that this doctrine is rested upon the ground that, because of its very nature, admiralty jurisdiction is wholly withdrawn from the States and that, therefore, the Federal jurisdiction, being exclusive, the legislative authority in the premises must necessarily be in Congress.⁸

As to whether or not it was the intention of the framers of the Constitution that Congress was to be regarded as constitutionally entitled to provide the law to be applied in cases in which the exercise of Federal judicial power rests upon the character of the parties thereto, and especially with reference to suits between citizens of different States of the Union, or between citizens of the United States and aliens, no clear light is thrown by the records which have been preserved of the debates in the Constitutional Convention or in the State ratifying conventions. In fact, however, Congress has never sought, with regard to such suits, to substitute its own enacted substantive laws for those of the States. By Section 34 of the original Judiciary Act, it provided that "the laws of the several States, except where the Constitution, treaties or statutes otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the

⁵ See *In re Neagle* (135 U. S. 1).

⁶ 10 Wh. 1.

⁷ See Chapter LXXIV.

⁸ *Providence and N. Y. S. S. Co. v. Hill Mfg. Co.* (109 U. S. 578).

United States, in cases where they apply." This provision has never been changed, and now constitutes Section 721 of the Revised Statutes. In the same act, as amended in 1792, it was provided that in equity and admiralty proceedings the modes of procedure in the Federal courts should be the customary ones, subject, however, to such changes as might be introduced by rules issued by the Supreme Court. Dr. F. J. Goodnow, in a valuable discussion of the power of Congress over the private law in force in the United States,⁹ points out that these declarations upon the part of Congress would seem to have involved a claim upon its part to a legislative authority in the premises. He also points out that, with reference to general commercial law, the Federal courts have been permitted to build up and apply a body of its own substantive doctrines as distinguished from those of any of the States, and he argues that what the Federal courts have thus been recognized to have the constitutional power to do, the Federal legislature should be conceded to have the power to do.

The Supreme Court has never, so far as the writer is aware, taken occasion to declare that Congress is without authority to provide the substantive law for the Federal courts in suits between citizens of the different States of the Union or between citizens and aliens.¹⁰ However, in *Kansas v. Colorado*,¹¹ the United States having intervened in the case and suggested that the court should, in its decree, in terms or in effect, give recognition of the right of the Federal Government to control the distribution of the water of the non-navigable stream which was in controversy, the court declared that Congress had no legislative power in the premises, and, with regard to matters of irrigation could not provide the substantive law to be applied in suits between States of the Union. However, the court did not base this holding upon the general proposition that Congress could not obtain legislative power from the Judicial Article of the Constitution.

Dr. Goodnow, in the volume to which reference has been made, says: "It is to be noted that one of the arguments used by the Supreme Court in favor of the legislative power of Congress in matters of maritime law is the necessity of developing the law. This argument would appear to have as much force in the matter of interstate controversies as in the matter of maritime law. The decision of the Supreme Court in *Kansas v. Colorado* may accordingly be regarded as authority for the statement that Congress derives no legislative power from that part of the Judicial Article which declares that the judicial power of the United States shall extend to controversies between States; but it cannot be said that because this is true it follows that Congress does not derive legislative power from other portions of the judicial article."

⁹ Chapter IV of his *Social Reform and the Constitution*.

¹⁰ Had it made such a declaration it would necessarily have been *obiter*.

¹¹ 206 U. S. 46.

§ 826. Federal Courts and the Construction of State Laws.

By the Constitution the Federal courts are given jurisdiction of all suits between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

In this grant of jurisdiction the determining factor is not the nature of the matter litigated or the law involved, but the character of the parties to the suits. No question of Federal concern, and no construction of a Federal law or constitutional provision need be involved. The subjects to be determined may, and, indeed, usually, in this class of cases, do depend wholly upon the interpretation and application of the laws of one or more of the States. The purpose in giving this jurisdiction to the Federal courts is thus not the protection of Federal rights, privileges, and immunities, but the provision of tribunals presumably more impartial than would be State tribunals when called upon to adjudicate between citizens of the State in which they are sitting and citizens of other States. This purpose is stated by Hamilton in No. LXXX of *The Federalist*. With reference to the clause of the Constitution providing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," he writes: "And if it be a just principle, that every government ought to possess the means of executing its own provisions, by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases, in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial, between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded."

That this exposition by Hamilton correctly exhibits the aim sought by this provision is also shown by the debates in the Constitutional and State ratifying conventions.¹²

In short, the theory is that the Federal courts when thus called upon by reason of the diversity of the citizenship of the parties to construe and apply State law, are to consider themselves as *ad hoc* agents of the State, and, therefore, under an obligation to apply that law as they find it. This obligation was recognized in the already quoted 34th section of the original Judiciary Act of 1789.

¹² See, for example, *Elliot's Debates*, III, 533, 557, 566.

§ 827. Force of State Interpretations.

What the proper construction of the State law is, which they are to apply, the Supreme Court of the United States has repeatedly declared is, subject to the exceptions hereinafter to be described, to be determined by the interpretation that has been given to it by the State that has enacted it. In *Elmendorf v. Tyler* ¹³ Marshall said: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. . . . (On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, and treaties of the United States." Again, in *Shelby County v. Guy*, ¹⁴ the Supreme Court declared: "Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may at times involve us in seeming inconsistencies, as when States have adopted the same statutes and their courts differ in their construction. Yet that course is necessarily indicated by the duty laid on us to administer, as between certain individuals, the laws of their respective States according to the best lights we possess of what those laws are."

Again, in *Polk's Lessee v. Wendell* ¹⁵ the court said: "The sole object for which jurisdiction of cases between citizens of different States is vested in courts of the United States, is to secure to all the administration of justice upon the same principles on which it is administered between citizens of the same State. Hence, this court has never hesitated to conform to the settled doctrines of the States on landed property, where they are fixed, and can be satisfactorily ascertained; nor would it ever be led to deviate from them in any case that bore the semblance of impartial justice." ¹⁶

¹³ 10 Wh. 152.

¹⁴ 11 Wh. 361.

¹⁵ 5 Wh. 293.

¹⁶ In *Re Duncan* (139 U. S. 449) the contention was raised that a certain law appearing upon the statute books had not been constitutionally passed and was, therefore, not valid. As to this the Supreme Court of the United States said: "It is unnecessary to enter upon an examination of the rulings in the different States upon the question whether a statute duly authenticated, approved and enrolled can be impeached by resort to the journals of the legislature or other evidence for the purpose of establishing that it was not passed in the manner prescribed by the State Constitution. The decisions are numerous, and the results reached fail of uniformity. The courts of the United States necessarily adopt the adjudication of the State courts on the subject." Citing *South Ottawa v. Perkins* (94 U. S. 260); *Post v. Supervisors* (105 U. S. 667); *Railroad Co. v. Georgia* (98 U. S. 359).

In *Daly v. James* (8 Wh. 495), Justice Johnson in a dissenting opinion said: "Upon

§ 828. Rule Not One of Constitutional Necessity: Exceptions.

From the quotations which have been made, the general rule governing the construction of State law by the Federal courts is sufficiently clear. We have now to consider the exceptions which have been made to its application.

First of all it is to be observed that the rule itself would appear to be one not so much of imperative constitutional necessity, as it is one of comity adopted by the Federal courts from a proper sense of the respect due to the States whose law they are supposed to administer, and that, therefore, the provision of Section 721 of the Revised Statutes states a purely statutory and not a constitutional requirement.

§ 829. Equity.

Even this statutory requirement, it is to be observed, is a limited one, its application being limited to trials at common law, the entire field of equity procedure thus being omitted from its control.¹⁷

In the comparatively early case of *Boyle v. Zacharie*¹⁸ the Supreme Court said: “. . . The acts of Maryland regulating the proceedings on injunctions, and other chancery proceedings, and giving certain effects to

the question so solemnly pressed upon this court in the argument how far the decision of the court of Pennsylvania ought to have been considered as obligatory in this court, I would be understood as entertaining the following views: As precedents entitled to the highest respect the decisions of the State courts will always be considered; and in all cases of local law we acknowledge an established and uniform course of decisions of the State courts in the respective States as the law of this court; that is to say, that such decisions will be as obligatory upon this court as they would be acknowledged to be in their own courts.”

In a dissenting opinion Justice Field in *B. & O. R. R. Co. v. Baugh* (149 U. S. 368) declared: “The theory upon which inferior courts of the United States take jurisdiction within the several States is, when a right is not claimed under the Constitution, laws, or treaties of the United States, that they are bound to enforce as between the parties the law of the State. It was never supposed that upon matters arising within the State any law other than that of the State would be enforced, or that any attempt would be made to enforce any other law. It was never supposed that the law of the State would be enforced differently by the Federal courts sitting in the State and the State courts; that there would be one law when a suitor went into the State courts, and another law when the suitor went into the Federal courts, in relation to a cause of action arising within the State,—a result which must necessarily follow if the law of the State can be disregarded upon any view which the Federal judges may take of what the law of the State ought to be rather than what it is.”

The whole question of the binding force upon the Federal courts of State laws as interpreted by the State courts was considered in the *Dred Scott* case (*Scott v. Sandford*, 19 How. 393), a majority of the court agreeing that the court was bound by the last decision of the Missouri court as to the effect of Scott's temporary residence in a free State.

¹⁷ By an act of May 8, 1792, it was provided that the procedure in equity cases in the Federal courts should be according to the peculiar principles, rules and usages of equity as distinguished from common-law courts.

¹⁸ 6 Pet. 635.

them in courts of law, are of no force in relation to the courts of the United States.

"The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction the courts of the United States are not governed by the State practice; but the act of Congress of 1792 (ch. 36) has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the State practice but according to the practice of courts of equity in the parent country, as contradistinguished from courts of law, subject of course to the provisions of the act of Congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe." ¹⁹

¹⁹ Cf. *Russell v. Southard* (12 How. 139); *Bein v. Heath* (12 How. 168); *Payne v. Hook* (7 Wall. 425); *Robinson v. Campbell* (3 Wh. 212); *U. S. v. Howland* (4 Wh. 108); *McConihay v. Wright* (121 U. S. 201); *Neves v. Scott* (13 How. 268).

In *Neves v. Scott* (13 How. 268) the court said: "Whenever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case, as they may find justly applicable thereto. These principles may take part of the law of a State, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States, the equity law, recognized by the Constitution and by Acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

In *Payne v. Hook* (7 Wall. 425), the court, with reference to the argument that inasmuch as under the law of the State a chancery court had not jurisdiction in the premises, the Federal court sitting as such had not, said: "If legal remedies are sometimes modified in the Federal courts to suit the changes in the laws of the States, and the practice of their courts, it is not so with the equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union."

In *Bein v. Heath* (12 How. 168), a case arising in Louisiana, in which State there was no equity as distinguished from common-law jurisdiction, the court said: "When an injunction is applied for in the circuit court of the United States sitting in Louisiana, the court grants it or not, according to the established principles of equity, and not according to the laws and practice of the State . . . in which there is no court of chancery, as distinguished from a court of common law."

In *Sheffield Furnace Co. v. Witherow* (149 U. S. 574); the court denied that a State by prescribing by statute an action at law could oust a Federal court, sitting in equity, of its jurisdiction as such. Quoting *Robinson v. Campbell* (3 Wh. 212), the opinion declared: "A construction that would adopt the State practice in all its extent would

It does not clearly appear from the citations and quotations just how far the Federal courts, when exercising their equity jurisdiction, are disposed to go in refusing to follow the substantive rules and law of the States. It is, however, quite clear that they take a very proper stand when they assert that their equity jurisdiction may not in any way be burdened by State law either by way of definition of what shall constitute equitable causes of action, or what procedure shall be followed or remedies applied. But in not a few cases the language, though for the most part *obiter*, is much broader than this, and indicates an apparent willingness to go beyond this and refuse to follow State law, even in statute form, with reference to substantive rights of law as distinguished from the rules of procedure and remedies.

It is of interest to note that Congress has not felt obligated by the constitutionally recognized distinction between law and equity to maintain unchanged the distinction between equitable and legal defences, for it has provided by statute that certain defences which formerly could be set up only in equity, may now be offered in actions at law.²⁰

§ 830. Rules of Evidence.

Generally speaking, Congress may of course provide the rules of evidence to be adopted by the Federal courts, and itself establish, or empower the

at once extinguish, in such States, the exercise of equitable jurisdiction. The acts of Congress have distinguished between remedies at common law and in equity, yet this construction would confound them. The court, therefore, thinks that to effectuate the purposes of the legislature the remedies in the courts of the United States are to be at common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

²⁰ 38 Stat. at L. 956. This statute of March 3, 1915, added the following sections to the Judicial Code:

"Section 274a. In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought in the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form.

"Section 274b. In all actions at law equitable defences may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defence of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

courts themselves to establish, the rules governing their procedure in the trial of cases, the preparing and printing of records, the perfecting of appeals, etc. With reference to the Federal legislative authority over the rules of evidence to be followed in the Federal courts, it is declared in *Potter v. National Bank*:²¹ "It is quite true that the 34th section of the Judiciary Act of 1789—preserved *totidem verbis*, in section 721 of the present revision of the statutes—has been construed as requiring the Federal courts, in all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the States in which such courts respectively sit. But that section of the Act of 1789, as does section 721 of the Revised Statutes, expressly excepts from its operations cases 'Where the Constitution, treaties or statutes of the United States otherwise provide.' We have seen that the existing statutes of the United States do 'otherwise provide,' in that they forbid the exclusion of a witness upon the ground that he is a party to or interested in the issue, in any civil action whatever pending in a Federal court, except in a certain class of actions, which do not embrace the one now before us. 'In all other respects,' that is, in all cases not provided for by the Statutes of the United States, the laws of the State, in which the Federal court sits, constitute rules of decision as to the competency of witnesses in all actions at common law, in equity or in admiralty. It is clear, therefore, that the law of Illinois can have no bearing upon a case which, as here, is embraced or has been provided for by the Federal Statute." ²²

Section 914 of the Revised Statutes provides that in the Federal courts in civil causes other than equity and admiralty, "the practice, pleadings and forms and modes of proceeding" shall conform "as near as may be" to the existing practice in the States in which they sit. There is thus left, even as to these causes, opportunity for variance of practice whether because of constitutional necessity, as for example with reference to jury trial, or because of statutory direction. Thus the rules with reference to the compulsory production of documentary evidence, the amendment of pleadings, etc., are fixed by Federal statute. So also, it is held that Federal judges are not bound by State rules with reference to instructing the jury, the granting of new trials, the submission of special issues to the jury, the preparation of a case for appeal, etc.

So far is the foregoing doctrine carried, that the Supreme Court has held that it will set aside a decision of a Federal court, interpreting a State

²¹ 102 U. S. 163.

²² There would seem to be a corresponding inability upon the part of Congress to fix the rules of evidence and procedure of State courts. Thus, for example, while it is competent for Congress to declare that certain unstamped documents shall not be received as evidence in the Federal courts, they might still be so received in the State courts. *Latham v. Smith* (45 Ill. 293); *Bowlin v. Commonwealth* (2 Bush, 5).

statute, which conflicts with an interpretation subsequently given to the statute by the highest court of the State.²³

§ 831. Unsettled Construction of State Law.

In *Green v. Neal* ²⁴ it was held that where a State court had changed its former construction of a law, the Federal courts, upon a subsequent case coming before them, should do likewise and thus keep ever in accord with the latest decisions of the State courts. "The same reason," the opinion declared, "which influences this court to adopt the construction given to the local law in the first instance, is not less strong in favor of following it in the second, if the State tribunals should change the construction." The court, however, added: "A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule." And in *Leffingwell v. Warren* ²⁵ the court said: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text (citing numerous cases). If the highest judicial tribunal of a State adopt new views as to the proper construction of such statute, and reverse its former decisions, this court will follow the latest settled adjudications." Here again it will be observed that the court is careful to say, not that it will always follow the latest construction of the State courts but the "latest settled adjudications."

It would appear, however, that though in general the Federal courts when called upon to apply State laws will follow the last interpretation given to them by the respective State courts, this will not necessarily be done where a change of construction by the State courts has been a recent one, and not supported by such a line of decisions as to have become, to use the language of the opinion in *Shelby v. Guy*,²⁶ "a fixed and received construction," and especially where the earlier construction is one that for a considerable period of time has been the uniformly accepted one in the State courts.

As will later appear,²⁷ the Supreme Court has held quite firmly to the doctrine that the construction by the State courts of the law relating to real property is to be followed by the Federal courts, but in *Kuhn v. Fairmont Coal Co.*,²⁸ the court held that this should be the practice only where the State determinations have become established rules of property and action prior to the accruing of the rights of the parties litigant. In this case prior adjudications were reviewed and explained, the language em-

²³ *Sioux County v. National Surety Co.* (276 U. S. 238). Citing *Hines Yellow Pine Trustees v. Martin* (268 U. S. 458), and *Bauserman v. Blunt* (147 U. S. 167).

²⁴ 6 Pet. 291; 8 L. ed. 402.

²⁵ 2 Black, 599.

²⁶ 11 Wh. 361.

²⁷ Section 837.

²⁸ 215 U. S. 349.

played in *East Central Eureka Min. Co. v. Central Eureka Min. Co.*²⁹ and *Brine v. Hartford Fire Ins. Co.*³⁰ being especially defined and restrained.³¹

§ 832. The Obligation of Contracts and the Construction of State Law.

In an earlier chapter has been considered the circumstances under which the Federal courts refuse to be bound by the construction given to State law by the State courts when the impairment of the obligation of contracts is involved.³²

§ 833. Federal Courts and the Common Law.

The general principle may be stated that there is no Federal common law—that, in other words, the law which the Federal courts apply consists wholly and exclusively of the Federal Constitution, treaties, the statutes of Congress, and the laws common and statutory of the several States of the Union.

The common law of the States consists of the principles of the English common law, developed and modified by American custom and judicial precedent. Having this great common substratum of the English common-law principles, the non-statutory law of the several States is, in very many respects, the same throughout the United States. But in other respects, statutory enactment and divergent customs and judicial determinations have led to important differences.

²⁹ 204 U. S. 266.

³⁰ 96 U. S. 627.

³¹ The following are given as rules that are "no longer to be questioned."

"1. When administering State laws and determining rights accruing under those laws, the jurisdiction of the Federal courts is an independent one, not subordinate to, but co-ordinate and concurrent with, the jurisdiction of the State courts.

"2. Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by State decisions as to become rules of property and action in the State, those rules are accepted by the Federal court as authoritative declarations of the law of the State.

"3. But where the law of the State has not been thus settled, it is not only the right, but the duty, of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon doctrines of commercial law and general jurisprudence.

"4. So, when contracts and transactions are entered into and rights have accrued under a particular State or local decision, or where there has been no decision by the State court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the State applicable to the case, even where a different view has been expressed by the State court after the rights of the parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the State court if the question is balanced with doubt."

Justices Holmes, White and McKenna dissented. See, for a later case, *Hines Yellow Pine Trustees v. Martin* (263 U. S. 458).

³² §§ 770 *et seq.*

In general, however, excepting where statutes have expressly amended the English common law as it was at the time of the separation from England, or where clear judicial *dicta* to the contrary are to be found, the general doctrines of the English common law are held to be in force.³³

Strictly applying the doctrine that the Federal courts, when exercising jurisdiction derived from the character of the parties to the causes tried, will apply the laws of the States applicable thereto, there is left no opportunity for the creation of a true Federal common law outside of and independent of the Federal Constitution and the treaties entered into and the laws passed in pursuance thereof.

That the Federal courts have no jurisdiction derived directly from the common law has been unquestioned since the early case of *Ex parte Bollman*,³⁴ in which the court said:

"As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution or by the laws of the United States. Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term *habeas corpus*, resort must unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by the written law."

That the Federal courts not only have no common-law jurisdiction, but that, generally speaking, there is no Federal common law as distinguishable from statute law (Constitution, treaties, acts of Congress) was declared in the comparatively early case of *Wheaton v. Peters*.³⁵ In that case the court said:

"It is clear that there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The

³³ Louisiana, whose law is founded on the Roman civil law, is an exception to this, but statute and judicial practice have brought the Louisiana law a long way toward conformity to the common law.

³⁴ 4 Cr. 75.

³⁵ 8 Pet. 591.

common law could be made a part of our Federal system only by legislative action.³⁶

§ 834. Interstate Commerce and Common Law.

This general doctrine that there is no Federal common law requires considerable explanation, if not qualification. In the first place, with reference to those matters of which interstate commerce is the most important example, general common-law principles are held, in the absence of express legislative provision to the contrary, to apply.

In *Western Union Telegraph Co. v. Call Publishing Co.*,³⁷ reaffirming the doctrines of previous cases with reference to the subject of interstate commerce, the court said:

"There is no body of Federal common law separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. After defining the term 'common law,' the court continued: 'Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment.'"

The principle here stated with reference to the subject of interstate commerce would seem to be applicable with reference to all other matters falling within the control of the Federal Government.

§ 835. General Principles of the Common Law as Distinguished from Their Special and Local Applications.

In *Olcott v. The Supervisors* ³⁸ Justice Strong, speaking for the court, said: "It must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the Constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments. That *Whiting v. R. R. Co.* was not a determination of any question of local law is manifest. It is not claimed to have been that. But it is relied upon as having given a con-

³⁶ It should be said that the Federal power to adopt common-law principles by statutory action may be exercised only with reference to those matters which by the Constitution are within the sphere of Federal regulation.

³⁷ 181 U. S. 92.

³⁸ 16 Wall. 678.

struction to the Constitution of the State. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the State Constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad owned by a corporation, is a matter of public concern. . . . It was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the State, is not a matter in which the public has any interest of such a nature as to warrant taxation in its aid. For this reason it was held that the State had no power to authorize the imposition of taxes to aid in the construction of such a railroad and therefore that the statute giving Fond du Lac County power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional law construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the Constitution of any other State as it has to the State of Wisconsin. Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no State court can conclusively determine for us. This consideration alone satisfies our minds that *Whiting v. R. R. Co.* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

§ 836. General Commercial Law: *Swift v. Tyson*.

The doctrine that, when the question is not one of peculiarly local law and local interest, the Federal courts will determine for themselves, without reference to the decisions of local courts what the law is, even though it be with reference to subjects exclusively within the legislative control of the States, and over which the Federal courts obtain jurisdictional power only by reason of the citizenship of the parties litigant, has received especial application in the field of commercial law.

This principle with reference to commercial law was first laid down by the Supreme Court in the case of *Swift v. Tyson*,³⁹ in which case, decided in 1842, was involved a doctrine of commercial law as applied to a New York transaction. The language of Justice Story who prepared the opinion in this case is broader than the case required and has given rise to so much discussion that it will be necessary to quote it at length. He said:

³⁹ 16 Pet. 1.

“Admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed or ancient local usage: but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the 34th section of the Judiciary Act of 1789 furnishes a rule obligatory upon this court to follow the decisions of the State tribunals, in all cases to which they apply. That section provides ‘that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.’ In order to maintain the argument, it is essential, therefore, to hold, that the word ‘Laws’ in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was supposed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but

in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*

"It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments."⁴⁰

⁴⁰ In the important case of *Burgess v. Seligman* (107 U. S. 20) the general attitude of the Federal courts with reference to following the construction given by the State courts to State law was reviewed and stated as follows:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

The doctrine declared in *Swift v. Tyson* has continued to guide the Supreme Court. Under its operation it has come about that in many cases it depends upon whether suit is brought in a Federal or a State court, as to what law will be held applicable to the matter in dispute.⁴¹

§ 837. Extension of Doctrine of *Swift v. Tyson*.

An extreme instance in which, in construing the common law, the Supreme Court refused to follow the determination of the State courts is exhibited in the recent case of *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*⁴² In this case the Supreme Court refused to follow the decision of a State court holding invalid as against public policy a contract whereby a railroad company had granted exclusive privileges at its station to a certain transfer company. Here, it is to be observed, the Supreme Court appears to have held that the right which it has reserved to itself to determine for itself, and uncontrolled by State decisions, what is the common law, relates not merely to questions of general commercial law, but to the common law in general, except, apparently, as to cases in which titles to land or fixed or ancient local usages are involved, for we find the court saying: "There is no question concerning title to land. No provision of State statute or constitution and no ancient or fixed local usage is involved. For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. . . . The applicable rule sustained by many decisions of this court is that in determining questions of general law, the Federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment."⁴³

⁴¹ *Cf. Brooklyn City, etc., Ry. Co. v. National Bank* (102 U. S. 14).

In *Smith v. Alabama* (124 U. S. 465) the court said: "A determination in a given case of what that [common] law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstances that the courts of the United States, in cases within their jurisdiction where they are called upon to administer the law of the State in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This was illustrated by the case of *New York C. R. Co. v. Lockwood* (17 Wall. 357), where the common law prevailing in the State of New York in reference to the liability of common carriers for negligence received a different interpretation from that placed upon it by the judicial tribunals of the State; but the law as applied is none the less the law of that State."

⁴² 276 U. S. 518.

⁴³ The cases cited as instances in which the Supreme Court had decided for itself questions of general law, were: *Swift v. Tyson* (16 Pet. 1) (involving a bill of exchange); *Carpenter v. Providence Washington Ins. Co.* (16 Pet. 495) (construction of an insurance policy); *Lane v. Vick* (3 How. 464) (construction of a will); *Foxcroft v. Mallett* (4 How. 353) (construction of a deed); *Chicago v. Robbins* (2 Black, 418) (what constitutes negli-

The doctrine of *Swift v. Tyson* with reference to the existence of a body of general commercial law, and its later development which appears to bring within its scope other branches of the common law, would seem to be so well established that, perhaps, there is not much practical use in criticizing it. Several observations with regard to the subject may, however, be made.

First: It may be pointed out that the effect of the doctrine is the substitution of law of Federal creation (or at least of Federal judicial determination) for State law with reference to matters which, by the Federal Constitution, are left within the exclusive legislative power of the States.

Second: It may well be questioned whether, in truth, there exists any "general law," commercial or of other character, such as the Supreme Court asserts to exist, and which it claims not itself to create but to find in existence, and to apply in place of the local law as laid down by the State courts. As to this point, one cannot do better than quote what Justice Holmes said in his dissenting opinion in *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*⁴⁴

"Books written about any branch of the common law treat it as a unit, cite cases from this court, from the Circuit Courts of Appeal, from the State courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. *Boquillas Land & Cattle Co. v. Curtis* (213 U. S. 339).

gence); *Yates v. Milwaukee* (10 Wall. 497) (what constitutes a dedication of land to a public use); *Olcott v. Fond du Lac County* (16 Wall. 678) (what public purpose warrants a municipal tax); *N. Y. C. R. Co. v. Lockwood* (17 Wall. 357) (liability of common carriers for injury to passengers); *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (129 U. S. 397) (validity of a contract for the carriage of goods); *B. & O. R. Co. v. Baugh* (149 U. S. 368) (responsibility of a railway to its employees for personal injuries); *Beutler v. Grand Trunk Junction R. Co.* (224 U. S. 85) (who are fellow servants).

Justices Holmes, Brandeis and Stone dissented.

⁴⁴ 276 U. S. 518.

But a general adoption of it does not prevent the State courts from refusing to follow the English decisions upon a matter where the local conditions are different. *Wear v. Kansas* (245 U. S. 154). It may be changed by statute, *Baltimore & O. R. Co. v. Baugh* (149 U. S. 368), as is done every day. It may be departed from deliberately by judicial decisions, as with regard to water rights, in States where the common law generally prevails. Louisiana is a living proof that it need not be adopted at all. . . .

" . . . If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all courts to bow, whatever their private opinions might be. *Mason v. United States* (260 U. S. 545); *Gulf Ref. Co. v. United States* (269 U. S. 125). I see no reason why it should have less effect when it speaks by its other voice. See *Benedict v. Ratner* (268 U. S. 353); *Sim v. Eidenborn* (242 U. S. 131). If a State constitution should declare that on all matters of general law the decisions of the highest court should establish the law until modified by statute or by a later decision of the same court, I do not perceive how it would be possible for a court of the United States to refuse to follow what the State court decided in that domain. But when the constitution of a State establishes a supreme court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The supreme court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says with an authority that no one denies except when a citizen of another State is able to invoke an exceptional jurisdiction that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority, however its function may be described."⁴⁵

The fact would seem to be, as appears from the opinions of the Supreme Court, that a conceived convenience has been the real force leading the court to its position upon this point. And even as to this it may be doubted whether general convenience is greatly advanced by a result which makes the law of a particular case depend in many instances upon the particular court—State or Federal—in which it happens to be brought.

Finally, it is to be observed that the doctrine of *Swift v. Tyson*, however correct in principle, by no means furnishes a means whereby a uniform law for the entire United States may be developed. In the first place, as already pointed out, such decisions as are declared under it are controlling only in the Federal courts. The State courts still remaining free to adopt them or reject them as they see fit.⁴⁶ In the second place the doctrine is

⁴⁵ See also Hare's *American Constitutional Law*, Chapter LI, and the dissenting opinion of Justice Field in *Baltimore & Ohio R. Co. v. Baugh* (149 U. S. 368).

⁴⁶ *Delmas v. Merchants' Mutual Ins. Co.* (14 Wall. 661). Professor Schofield questions whether it was necessary to admit this right of the State courts. See *Illinois Law Rev.*, IV, 547.

applicable in the Federal courts themselves only with reference to those questions of law upon which there is in the State whose law is involved, no defining statute, or well-established local usage. Thus whatever may have been the doctrine adopted by the Federal courts as deducible from the principles of general law, it cannot be applied in a State in which a statute or well-established usage prescribes a different one. In other words, the doctrine goes no further than to permit the Federal courts to disregard those decisions of State courts which have themselves been founded, not upon statute or usage, but upon the abstract principles of general law.

§ 838. Summary.

Summing up the discussion of the topic of the Federal courts and State laws, it is apparent that in a number of directions the Federal courts, while deriving jurisdiction from the nature of the parties but presumably applying State law, have in fact built up for themselves a considerable body of law which is neither laid down in the Federal Constitution, treaties, and laws of Congress nor in conformity with the laws of the States as determined by their respective judicial tribunals.

Whether this body of law may properly be termed Federal common law may possibly be questioned. It is unquestionably Federal in the sense that it owes its authority to, and is applied by, the Federal courts; and it is common in that it may be enforced by the Federal courts throughout the Union. There is, however, good reason for holding that it is essentially State law. The fact that it differs from the law as laid down by the State courts is due to the peculiar circumstance that, under our judicial system, two coördinate sets of courts have the power to interpret and determine the common law of the several States. In other words, the Federal courts have taken the position that, when sitting for the enforcement of State laws, they do not sit as tribunals subordinate to the State courts, but as tribunals coördinate with them; and that, therefore, they have an independent right to determine what is the non-statutory law of the State, using for that purpose the same sources of information that the State courts use in determining for themselves the same laws.

§ 839. Comity between the Lower Federal Courts.

There is no obligation upon the part of one of the lower Federal courts to follow the doctrines previously declared by other lower Federal courts, and, in fact, there have been numerous instances in which these courts have, in different cases, asserted inconsistent and even directly contradictory doctrines of law. This diversity of Federal judicial opinion has necessarily persisted until the Supreme Court has found a proper opportunity, in a case coming before it, to declare what shall be, for the future, the true doctrine.

That such a diversity of Federal judicial opinion is to be regretted, all will admit, but it is now in large measure prevented by the lower courts

requesting from the Supreme Court its judgment upon disputed doctrines of law, or by the action of that court, *ex proprio motu*, requiring that the points be certified to it for determination.

§ 840. Federal Courts and International Law.

In so far as applicable, American courts apply established doctrines of international law. Not, however, in the sense that they apply a body of law which has not been derived from and based upon the sovereign will of the American State, but upon the theory that this body of rules is first impliedly adopted by the State and thus made a portion of its own municipal law. Resting thus upon the implied assent and adoption of the United States, these principles of international law are subject to express modification by statute. In the very early case of *The Charming Betsy*,⁴⁷ decided in 1804, it seems to have been accepted as a principle not needing argument that the court would be bound by an act of Congress providing a rule different from that laid down by international law, the only observation made being that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.' In *The Nereide* ⁴⁸ Marshall again declared: "Till an act [of Congress] be passed, the court is bound by the law of nations, which is a part of the law of the land."

In *Hilton v. Guyot* ⁴⁹ the court said: "International law in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

"The most certain guide no doubt for the decisions of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations." ⁵⁰

In the case of *The Lottawanna*, *sub nomine* *Rodd v. Heart*,⁵¹ is set out in

⁴⁷ 2 Cr. 64.

⁴⁸ 9 Cr. 388.

⁴⁹ 159 U. S. 113.

⁵⁰ Citing *Fremont v. United States* (17 How. 542); *Sears v. The Scotia* (14 Wall. 170); *Respublica v. De Longchamps* (1 Dall. 111); *Moultrie v. Hunt* (23 N. Y. 394).

⁵¹ 21 Wall. 558.

the clearest possible manner the extent to which, and the manner in which, any body of law not originally municipal, may, by adoption, become such. That case had reference to the adoption by the United States of the general principles of maritime law, but, as is pointed out in the argument, the principle is the same with reference to international law. Justice Bradley, speaking for the court, said:

"The ground on which we are asked to overrule the judgment in the case of *The General Smith* is, that by the general maritime law, those who furnish necessary materials, repairs and supplies to a vessel, have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.

"The proposition affirms that the general maritime law governs this case, and is binding on the courts of the United States.

"But it is hardly necessary to argue that the general maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each State only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several States of this Union also presents an analogous case. It is the basis of all the State laws; but is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common law by those who use them. But, like those laws, however fixed, definite and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet in each country peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where it comes in contact with or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly-received law of the whole commercial world is more assiduously observed—as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations

(our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence, and do not affect other nations. It will be found, therefore, that the maritime Codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that, whilst there is a general correspondence between them, arising from the fact that each adopts the general principles, and the great mass of the general maritime law as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate and genius of the people of each country respectively. Each State adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation which adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world."

An interesting case with reference to the municipal force of international usages is *The Paquete Habana*.⁵²

This case involved the question whether, in the absence of a municipal law so providing, the principle that fishing smacks belonging to an enemy are not subject to seizure in time of war, had become so well recognized in international law as to warrant the court in declaring illegal a capture made by the United States naval forces. In its opinion the court said: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

After an exhaustive examination of precedents, and of views of commentators, the court said: "This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of,

⁵² 175 U. S. 677.

and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter." ⁵³

In this case we undoubtedly have the acceptance as law, by our courts, of an international usage, and that, too, one in whose favor neither universal and long-continued acceptance by nations nor unanimous advocacy by scientific commentators could be successfully urged. But this was by no means a repudiation of the principle declared by the Supreme Court in *The Lottawanna* case. The Federal Constitution provides that Congress shall have the power to define and punish offences against the law of nations, and to make rules concerning captures on land and water. Furthermore, it is declared that treaties made under the authority of the United States shall be the supreme law of the land. The effect of these clauses which recognize the existence of a body of international laws and the granting to Congress of the power to punish offences against them, the courts have repeatedly held is to adopt these laws into our municipal law *en bloc* except where Congress or the treaty-making power has expressly changed them. Where, then, Congress has not acted, the courts properly hold that it is its intention that the generally recognized principles of international conduct shall be applied, in exactly the same way in which it has been held that with reference to the regulation of interstate commerce the silence of Congress is deemed equivalent to an expression of its will that that commerce shall be free from control.

There was, therefore, in this *Paquete Habana* case that acceptance by the State which the courts have consistently declared is required for the transmutation of an international rule into a municipal command.

Where principles of international law are applicable they do not need to be proved as in the case of foreign municipal laws, but may be taken judicial cognizance of by the courts. That is, they may, if not already known to the court, be ascertained by the court by its own study of the proper sources of information.⁵⁴

§ 841. Federal Criminal Law.

There is no common, non-statutory, Federal criminal law. The Federal courts have no criminal jurisdiction save that given them by statute of Congress; and no act is recognized as a crime against the peace of the United States except as it has been declared such by act of Congress; and Congress

⁵³ In a dissenting opinion by the Chief Justice, Justices Harlan and McKenna concurring, the argument was not so much a denial that the exemption of fishing smacks from capture in time of war is a practice generally sanctioned by modern practice and by the opinions of international law writers, as that it lies within the discretion of the executive power to determine the rigors of war, and that in the proclamation and directions which, in the exercise of that discretion, had been issued, no such exemption had been expressly or impliedly authorized.

⁵⁴ *The Scotia* (14 Wall. 170).

has of course no constitutional power to create crimes and affix penalties to their commission, except as to subjects or in places which the Constitution places under Federal control. Thus, as a means of compelling obedience to the laws which Congress is constitutionally empowered to enact, it may attach penalties to their violation.

But, though the Federal courts have no common-law Federal jurisdiction, and though there is no common, non-statutory criminal law for them to administer, they may, and indeed have been authorized by statute to, adopt common-law remedies and punishments where Congress has not otherwise provided. Thus Section 722 of the Revised Statutes reads:

“The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title and of Title ‘Civil Rights’ and of the Title ‘Crimes,’ for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and law of the United States, shall be extended to govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.”

In *Tennessee v. Davis*,⁵⁵ a case removed from the State into the Federal court under Section 643 of the Revised Statutes, it was argued that no mode of procedure in trial of the criminal offence charged had been prescribed by act of Congress. The court, however, said: “While it is true there is neither in Section 643 nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered, the case when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State’s criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case.”

Because there are no Federal common-law crimes it results that all Federal indictments must charge the accused with the violation of some specific statute or statutes of Congress.

⁵⁵ 100 U. S. 257.

As to the extent of the power of Congress to create statutory crimes it may be said, generally, that, aside from specific offences, such as piracy and felonies on the high seas, offences against the law of nations, counterfeiting the securities and current coin of the United States, etc., which are specifically placed by the Constitution under Federal authority, there is the implied power of Congress to provide for the enforcement by criminal proceedings, if deemed just and expedient, of any law which it has the constitutional competence to enact, and for the protection of every Federal right, privilege and immunity, whether of the individual or of the government, and whether expressly provided for in the Constitution, or implied in the polity of that instrument.

The constitutional requirements with reference to the manner in which the Federal criminal jurisdiction is to be exercised, are elsewhere considered.⁵⁶

§ 842. Federal Criminal Law in State Courts.

It will be remembered that Congress has not seen fit in all cases to vest the exercise of the entire extent of the Federal judicial power exclusively in the Federal courts. The constitutionality of thus leaving in the State courts jurisdiction that might be vested exclusively in the Federal courts, or of allowing both systems of courts to exercise concurrent jurisdiction as to civil matters has not been seriously questioned by the courts.

As to criminal cases the original Judiciary Act provided that the Federal District and Circuit Courts should have jurisdiction, "exclusively of the courts of the several States" over all crimes and offences "cognizable under the authority of the United States." It was not long, however, before Congress so legislated as to permit the State courts to take jurisdiction of certain special cases of a criminal nature, as, for example, in certain cases with respect to fines, forfeitures and penalties under the License Tax on Wines and Spirits Act of 1794, the act to Establish Trading Houses with the Indian Tribes of 1796, and the Paper Stamp Tax Act of 1797.⁵⁷ The vesting of jurisdiction in the State courts to try Federal criminal offences was still more explicitly provided for in the act of 1799 for establishing the Post Office,⁵⁸ which provided that the jurisdiction of the State courts might extend not only to matters of fines, forfeitures, etc., under the act, but also to such serious offences as robbery of the mails.⁵⁹

Notwithstanding these and other uncontested instances of the vesting in

⁵⁶ See Chapter LXIV.

⁵⁷ See the excellent article of Charles Warren, entitled "Federal Criminal Laws and State Courts" in XXXVIII *Harvard Law Review*, 545.

⁵⁸ 28 Stat. at L. 733.

⁵⁹ For further historical data with regard to the vesting in the State courts of jurisdiction to try offences against the United States, see the article by Charles Warren earlier referred to.

the State courts of jurisdiction over Federal crimes, there occurred, rather surprisingly, a number of *dicta* in decisions of the Supreme Court declaring, in general terms, the unconstitutionality of the foregoing action. Thus, in *Martin v. Hunter's Lessee*,⁶⁰ there was the *obiter* declaration of Justice Story that "no part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals," and, in *Houston v. Moore*,⁶¹ this assertion was again repeated, with the added statement that "no concurrent power is retained by the States, because the subject matter derives its existence from the Constitution, and the authority of Congress to delegate it cannot be implied, for it is not necessary or proper in any constitutional sense." So also, we find Justice McLean, in a dissenting opinion in *United States v. Bailey*⁶² declaring: "It is not in the power of Congress to transfer any part of the jurisdiction which the Constitution has vested in the Federal Government. If this can be done by Congress, to any extent, it may be done without limitation; and in this way the powers of the Federal Government might be lessened or utterly destroyed."⁶³

It is to be observed that the inconsistency of these declarations with what had been the uncontested practice from almost the beginning of the government is, in a measure at least, explainable by the fact that the point that the justices had chiefly in mind was the right of the Federal Government to require the State courts to exercise their powers for the enforcement of Federal criminal laws. As to the constitutional inability of the Federal Government thus to compel the governmental agencies of the States to act, there would seem to be no question,⁶⁴ but that they might be permitted to do so, would seem to have been made plain by the Supreme Court in *Tennessee v. Davis*,⁶⁵ decided in 1880, when, speaking through Justice Strong, it was declared that there were no inherent difficulties in the way of the trial in the Federal courts of indictments for alleged offences against the peace and dignity of the States, provided, of course, there were present other facts which would justify the exercise of the Federal jurisdiction. By a parity of reasoning, it would seem to follow that the State courts, having general jurisdiction under the laws of their States, might be permitted to take cognizance of, and enforce, Federal laws, the only difference being that, whereas the Federal Government might compel the exercise of the jurisdiction by the Federal courts, and even against the resistance of the State courts, it might only authorize, but not compel, the exercise of jurisdiction by the State courts.

⁶⁰ 1 Wh. 304.

⁶¹ 5 Wh. 1.

⁶² 9 Pet. 238.

⁶³ Mr. Warren, in the article earlier referred to, points out that, at the time the justices of the Supreme Court were expressing the foregoing views, Congress was providing for the removal of cases from the State into Federal courts, taking from the State courts the trial of criminal cases charging offences under laws of the States.

⁶⁴ See § 71.

⁶⁵ 100 U. S. 257.

The fact remains, however, that there is as yet no clear holding that Congress may authorize the State courts to lend their aid in the enforcement of Federal criminal law, and no such holding can be had so long as Section 256 of the Judicial Code remains unamended which declares that the jurisdiction vested in the courts of the United States "shall be exclusive of the courts of the several States," in "cases and proceedings" of "all crimes and offences cognizable under the authority of the United States," and of "all suits for penalties and forfeitures incurred under the laws of the United States." ⁶⁶

§ 843. General Consideration of the Enforcement of Federal Laws by State Courts.

It is clear that State courts must look to the Constitution and laws of their own States as the source of their jurisdictional powers. As regards, however, the substantive law which they are to apply in the exercise of their jurisdictional powers, they are required to look not only to the Constitution and laws (statutory and common) of their State, but to the Federal laws as well, when these are applicable in the causes which come before them, and, indeed, are obligated to enforce these laws in preference to those of their own States when there is a conflict between the two. ⁶⁷

The obligation of the State courts with reference to the enforcement of Federal laws can be illustrated by a consideration of the case of *Hoxie v. N. Y., N. H. & Hartford R. Co.*,⁶⁸ decided in 1909 by the Supreme Court of Errors of Connecticut, and the case of *Mondou v. N. Y., N. H. & Hartford R. Co.*⁶⁹ decided in 1912 by the Supreme Court, which criticized the doctrine declared in the Connecticut case.

In the Connecticut case the plaintiff had based his action solely upon the act of Congress, of April 22, 1908,⁷⁰ relating to the liability of interstate railway companies for accidents to their employees. This act created a special statutory right of action on the part of the injured employee or of his representatives, which was not known to the common law or to chancery, and expressly provided ⁷¹ that the jurisdiction of the courts of the United States under the act should be concurrent with that of the courts of the several States. In the *Hoxie* case the Connecticut court held that, while

⁶⁶ It may, however, be observed that, by Section 1014 of the Revised Statutes, State magistrates are permitted to arrest upon warrant or admit to bail for trial before the Federal courts persons charged with offences against the United States. The Volstead Act, 41 Stat. at L. 207, Section 2, makes applicable this Section 1014 of the Revised Statutes. Generally on the enforcement of the Volstead Act through State agencies, see the article by J. R. Chamberlain in 10 *American Bar Association Journal*, 391.

⁶⁷ Of course, the State courts, if convinced that the Federal laws are unconstitutional, may refuse to recognize their validity, in which case the question as to this is finally determined by appeal, writ of error, or certiorari, by the Federal Supreme Court.

⁶⁸ 73 Atl. Rep. 754.

⁶⁹ 223 U. S. 1.

⁷⁰ 35 Stat. at L. 65.

⁷¹ By amending act of April 5, 1910 (36 Stat. at L. 291).

there was no question that Congress could change the substantive law relating to interstate commerce which change would have to be recognized by the State as well as by the Federal courts, it was not within the right of the plaintiff to insist that the State court should entertain the action which could be sustained only by disregarding many of the requirements of the State law with respect to both pleadings and evidence. The Connecticut court said: "If it be assumed that Congress has power to prescribe a different rule for accidents occurring in or outside of Connecticut in the course of running a railroad train between States, and to create a new statutory action for its enforcement cognizable by the courts of the United States, it cannot, in our opinion, require such an action to be entertained by the courts of this State. It would open a door to serious miscarriages of justice through confusing our juries if one rule of procedure were to be prescribed in one class of suits against an employer, and another, diametrically opposed to it, in another class of them. . . . It would also be to compel courts established by a sovereign power, and maintained at its expense for the enforcement of what it deemed justice, to enforce what it deemed injustice. If Congress may thus change the common law relations of master and servant by giving a new form and cause of action in the courts of the United States, it does not follow that they can give a servant a right to such remedy in those States where these relations remain unaltered."

For an appreciation of the doctrine declared by the Connecticut court in this case, it is to be borne in mind that the court raised no question as to its general jurisdiction under the laws of the State to entertain a suit by the plaintiff for the recovery of damages from the defendant because of injuries received in the course of his employment as an employee of the railroad. The only question was whether he was entitled to bring his action in the form and prosecute it in the manner prescribed by the Federal statute.

In the case of *Mondou v. N. Y., N. H. & Hartford R. Co.* the Supreme Court reviewed another decision of the Connecticut court which had reaffirmed the doctrine of the *Hoxie* case, and, with reference to the doctrine of that case, said: "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." After quoting from *Clafin v. Houseman*,⁷² the court continued: "We are not disposed to believe that the exercise of jurisdiction by the State courts will be attended by any appreciable inconven-

⁷² 93 U. S. 130.

ience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. . . . It never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudications are unlike those applied in other cases. We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

